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In The

Supreme Court of the United States

October Term, 1973

No. 73-1256

CONNELL CONSTRUCTION COMPANY, INC.,
Petitioner,

v.

PLUMBERS AND STEAMFITTERS LOCAL UNION NO. 100, etc.,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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PLUMBERS AND STEAMFITTERS LOCAL UNION NO. 100, etc.,
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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Connell Construction Company, Inc. respectfully prays that a Writ of Certiorari issue to review the Judgment of the United States Court of Appeals for the Fifth Circuit entered in this cause on August 22, 1973.

OPINIONS BELOW

The findings of fact and conclusions of law in the District Court are reported at 78 LRRM 3012 (N.D. Tex. 1971) and are reproduced as Appendix A (pp. A-1 - A-7, infra). The opinion of the Court of Appeals is reported 483 F. 2d. 1154 (5th Cir. 1973), and is reproduced as Appendix B (pp. B-1 - B-65, infra.)

JURISDICTION

The judgment and opinion of the Court of Appeals, with Judge Clark dissenting, was entered on August 22, 1973. Petitioner made timely Motion for rehearing en banc, which Motion was denied by Order of the Court of Appeals on November 19, 1973 (Appendix B, p. B-66, infra). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

I.

Whether an agreement in restraint of trade between a union and a general contractor in the construction industry which requires the general contractor to refuse to do business with, and to boycott any business entity unless such entity is a party to an exclusive form of collective bargaining agreement with that particular union, violates the Sherman Anti-Trust Act and/or the anti-trust laws of the State of Texas in the absence of a collective bargaining relationship between such trade union and such general contractor.

II.

Whether a federal court should adjudicate questions of the National Labor Relations Act when such questions arise in the context of, and are vital to, determinations of violations of the federal and/or state anti-trust laws.

III.

Whether an agreement in restraint of trade and combination between a general contractor and a union is protected by the National Labor Relations Act if the agreement, its procurement and its maintenance, are not addressed to the labor relations of the general contractor *vis-a-vis* his own employees and the agreement is not for any legitimate union interest.

FEDERAL AND STATE STATUTES INVOLVED

The Federal Statutes involved are as follows:

1. Sherman Anti-Trust Act (15 U.S.C. § 1) (Appendix C, (p. C-1).
2. Clayton Act, Sections 6 and 10 (15 U.S.C. § 17, and 29 U.S.C. § 52) (Appendix C, p. C-1 - C-2).
3. National Labor Relations Act (29 U.S.C. § 151, et seq. Sections 7, 8(b)(4)B, 8(e) (Appendix C, pp. C-2 - C-4).

The State Statutes involved are as follows:

1. Vernon's Texas Codes Annotated, Business and Commerce Codes, Sections 15.02, 15.03 and 15.04 (Appendix C, pp. C-4 - C-6).

STATEMENT OF THE CASE

Petitioner, hereinafter referred to as "CONNELL", is a general contractor engaged in the construction business in Dallas, Texas. CONNELL has collective bargaining agreements with various construction trade unions which represent its employees. CONNELL does not, however, employ anyone engaged in plumbing or similar work. Union has at all times been a "stranger union" to CONNELL and its employees. CONNELL obtains its work on a competitive bid basis and, in turn, selects subcontractors for plumbing and mechanical equipment, materials and labor on a competitive bid basis. Prior to the events which resulted in this case, CONNELL had done business for many years with both union and non-union plumbing and mechanical subcontractors.

Plumbers and Steamfitters Local Union No. 100, Respondent herein, and hereinafter called "UNION", represents its members with various mechanical and plumbing firms in the North Texas area. UNION negotiated a Master Area-Wide collective bargaining agreement with a multi-

employer association consisting of the largest unionized plumbing and mechanical construction firms in the North Texas area.

In late 1970, UNION demand that CONNELL enter into an agreement with UNION whereby CONNELL would agree not to do any business with plumbing and mechanical construction firms unless such firms were parties "to an executed current collective bargaining agreement" with UNION.[1] When CONNELL failed to sign the agreement, UNION, in January 1971, commenced picketing a construction project on which CONNELL was general contractor.

At the time such picketing was commenced, approximately 150 employees of CONNELL and various subcontractors working on that project left the project, bringing about a halt to all construction work. The plumbing subcontractor on CONNELL's project being picketed in fact had a collective bargaining agreement with UNION. The admitted purpose of the picketing by UNION was to force CONNELL to enter into the agreement restricting CONNELL's right to select or to do business with plumbing and mechanical subcontractors unless they had a collective bargaining agreement with UNION. UNION did not seek to organize or to represent any of CONNELL's employees.[2] This picketing continued until a Temprorary Restraining Order was issued against UNION by the 134th District Court of Dallas County, Texas on January 21, 1971. The Restraining Order was issued after CONNELL had filed suit in that Court alleging that the subject agreement and the picketing for same were violative of the anti-trust laws of the State of Texas.

UNION successfully removed the case to the United States District Court for the Northern District of Texas

[1] The agreement is set forth on Page 2 of the Fifth Circuit's opinion, Appendix B (p. B-2, infra), and as Appendix D (p. D-1, infra).

[2] UNION'S forwarding letter with the proposed agreement is set forth in Appendix D, p. D-2. CONNEL'S reply to UNION appears at Appendix D-4.

and, after that Court refused to remand the case to the State Court, CONNELL entered, under protest, into the agreement with UNION not to do any business with mechanical or plumbing firms which did not have a collective bargaining agreement with UNION.

CONNELL then amended its pleadings in the United States District Court seeking a Declaratory Judgment, pursuant to 29 U.S.C. § 2201, that the subject agreement with UNION violated the Sherman Anti-Trust Act as well as the anti-trust laws of the State of Texas. UNION filed a counterclaim seeking a Declaratory Judgment that the agreement was legal and was protected by Section 8(e) of the National Labor Relations Act (29 U.S.C. § 158-e), hereinafter referred to as "NLRA".

During the trial of the case, UNION's business agent testified that the only collective bargaining agreement UNION could enter into with plumbing firms was the identical agreement UNION had with the multi-employer group of mechanical contractors. This fact was further established by provisions of the Master Area Agreement barring UNION from entering into contracts providing for lesser wages and working conditions.

After the trial of the case before the Federal District Court, Judge Sara T. Hughes issued Findings of Fact and Conclusions of Law on November 9, 1971, Judgment being entered in the case on November 18, 1971, (Appendix A, p. A-7). The District Judge held that the agreement in question was protected by the construction industry proviso to Section 8(e) of the NLRA, thereby immunizing it from the federal and/or state anti-trust laws.

Appeal of the District Court's Judgment was timely perfected to the United States Court of Appeals for the Fifth Circuit, and the Court of Appeals, Judge Clark dissenting, rendered its sixty-five (65) page decision and opinion affirming the judgment of the District Court on August 22, 1973. CONNELL subsequently and timely filed a Petition for Rehearing and for Rehearing *en banc*, and, on November 19,

1973, the Court of Appeals issued its Order denying the Motion. Judge Clark dissented as to the denial of CONNELL's Petition for Rehearing, (Appendix B, p. B-66).

The majority opinion of the Court of Appeals held that the activities of UNION and the questioned agreement were immune from the federal anti-trust laws and that the anti-trust laws of the State of Texas were preempted by federal labor law. The majority of the Court of Appeals failed to find an illegal conspiracy on the grounds that CONNELL was the sole "non-labor" party to the questioned agreement (Appendix B, p. B-23, infra). However, the majority of the Court refused to decide whether the questioned agreement was violative of, or protected by, the NLRA, even though the District Court had previously found the agreement to be protected solely by Section 8(e) of that Act. The Court of Appeals acknowledged that the General Counsel of the National Labor Relations Board (NLRB) had refused to issue a complaint in a case involving picketing by UNION to obtain a similar agreement from another generator contractor (Appendix B, pp. B-6 and B-45), in Dallas, Texas and strongly urged that the NLRB decide the labor issues of the questioned agreement at the "next available opportunity";[3] however, the Court majority refused to pass on the labor issues even though they are inextricably joined with the anti-trust questions of this case.

Judge Clark, dissenting, found that the doctrine of primary jurisdiction under the national labor laws did not constitute a bar to judicial relief in the instant case or a bar to

[3] The majority of the 5th Circuit Court stated:

"We feel quite strongly that the Board should take and consider this issue fully at the next available opportunity. Its resolution will have significant impact on labor relations in the construction industry. Repeated attempts by an administrative body to avoid resolution of a difficult issue may constitute an abuse of discretion." (Appendix B, p. B-40, infra).

The General Counsel of the NLRB has continued to refuse to issue Complaints in two cases pending with him involving identical agreements prior to the 5th Circuit's opinion and in one filed with the NLRB since the Court's decision, as discussed in Reasons for Granting the Writ, infra.

a determination of labor law issues by the Court of Appeals. Judge Clark also found that UNION was not immune from the Sherman Anti-Trust Act as to its actions and purposes in issue before the Court and that UNION's actions were secondary in nature, violative of both the NLRA and the Sherman Anti-Trust Act, and were not protected by the construction industry proviso to Section 8(e) of the NLRA.

FEDERAL JURISDICTION

Jurisdiction in the United States District Court for the Northern District of Texas was initially predicated on the Federal Removal Statute, 28 U.S.C. § 1441, and pursuant to Section 301(b) of the NLRA, 29 U.S.C. § 185(b). Jurisdiction is further conferred by CONNELL's allegations that the agreement in question violates the Sherman Anti-Trust Act, 15 U.S.C. § 1, et seq., and both parties petitioning the Court for relief pursuant to the Federal Declaratory Judgment Act, 28 U.S.C. § 2201.

REASONS FOR GRANTING THE WRIT

This case presents vital questions of the proper balance between federal anti-trust and labor policies in the nation's largest industry. It is estimated by the Department of Commerce that ONE HUNDRED FORTY-THREE BILLION ($143,000,000,000) DOLLARS will be spent on new construction in the United States in 1974, of which FORTY-THREE BILLION ($43,000,000,000) DOLLARS will be spent on public utilities and public construction, which is paid for by the American public in taxes and utility payments.[4] Therefore, agreements which artificially increase construction costs and restrict competition, as the one herein does, deserve the attention of this Court.

If these restrictive agreements between employers and unions are allowed to continue, they can effectively destroy

[4] *Construction Review*, Vol. 19, No. 9, U.S. Department of Commerce, Sept. 9, 1973, at p. 5. (These figures do not include construction maintenance and repair).

the rights of millions of employees,[5] drive many companies from the construction market and effectively emasculate the Sherman Anti-Trust Act and NLRA for the construction industry. The central question of this case is whether general contractors, such as CONNELL, owners, suppliers, manufacturers and others who perform on-site construction work, can continue to contract for the purchase and installation of construction materials and equipment on a competitive basis or whether they must restrict competition by doing business solely with a favored class of companies which have the "seal of approval" of a particular union. Also involved, as is shown below, is the destruction of all employee rights guaranteed by Section 7 of the NLRA.

In discussing the error of the Court of Appeals, it is important for the Justices of this Court to understand that the UNION sought no representation or work preservation objectives from CONNELL. UNION does not represent nor seek to represent a single employee of CONNELL, but only seeks, and thus far has gained, the right to dictate with whom CONNELL may do business. As this Court ably stated the distinction in *National Woodwork Manufacturers' Association v. NLRB*, 386 U.S. 612 (1967):

> "The touchstone is whether the agreement or its maintenance is addressed to the labor relations of the contracting employer (CONNELL herein) *vis-a-vis* his own employees." (386 U.S. at 645).

A. THE DECISION OF THE COURT OF APPEALS LEAVES RESULTS WHICH ARE IN CONFLICT WITH PRIOR DECISIONS OF THE COURT.

Prior to forcing CONNELL to agree to refuse to do business with any plumbing and mechanical firms unless they had a collective bargaining agreement with UNION, the

[5] The Amicus Brief filed with the 5th Circuit by the AFL-CIO, Building and Construction Trades Dept. stated that they alone represent three million construction employees. The rights of many of those employees and the millions of non-union construction employees, as guaranteed by Sec. 7 of the NLRA, can be obliterated by the questioned agreement.

local multi-employer group of mechanical contractors and UNION entered into a collective bargaining agreement whereby UNION agreed to impose no lesser wages and working conditions of the Master Agreement on all other mechanical firms.[6] This type of collective bargaining has been condemned by this Court in *United Mine Workers v. Pennington*, 381 U.S. 657 (1965), and in *Ramsey v. United Mine Workers*, 401 U.S. 302 (1971).

In *Pennington*, this Court stated:

> "(W)e think a union forfeits its exemption from the anti-trust laws when it is clearly shown that it has agreed with one set of employers to impose a certain wage scale on other bargaining units. One group of employers may not conspire to eliminate competitors from the industry and the union is liable with the employers if it becomes a party to the conspiracy. *This is true even though the union's part in the scheme is an undertaking to secure the same wages, hours, or other conditions of employment from the remaining employers in the industry.*" Id.-665-666 (emphasis added)
>
> "(T)here is nothing in the labor policy indicating that the union and the employers in one bargaining unit are free to bargain about the wages, hours and working conditions of other bargaining units or to attempt to settle these matters for the entire industry. On the contrary, the duty to bargain unit by unit leads to a quite different conclusion. The unions' obligation to its members would seem best served if the union retained the ability to respond to each bargaining situation as

[6] Article XIX of the Master Collective Bargaining Agreement provides as follows: "The Union further agrees that during the life of this Agreement that it will not grant or enter into any arrangement or understanding with any other employer *which provides for any wages less than stipulated in this Agreement* as the minimum wages *or for work under any more favorable term or conditions* to the employer than are expressed or implied in this Agreement *for less than the rate of wages indicated in this Agreement.*" (emphasis added). At the time of trial herein, UNION had negotiated another Master Agreement containing identical language in Article XVII.

the individual circumstances might warrant, without being straight-jacketed by some prior agreement with the favored employers." Id. at 666.

UNION then went completely outside of any collective bargaining framework and forced CONNELL to agree to refuse to do business with any mechanical or plumbing firms other than the favored employers who were parties to the Master Area Agreement or those that would adopt it, if the UNION would allow them to do so. UNION's business agent testified at the trial of this case that UNION would not and could not sign any agreement other than the Master one with any company. Thus the questioned agreement is in direct conflict with this Court's decisions in *Pennington* and *Ramsey*, supra.

The questioned agreement is violative of the Sherman Act on its face. An analysis of the questioned agreement quickly reveals that it is a contract in restraint of trade, and a union and employer have conspired by entering into the agreement to restrain trade in the construction industry. It was stipulated at the trial of this case that CONNELL was engaged in interstate commerce, or in a business affecting interstate commerce. The agreement is in direct conflict with Section 1 of the Sherman Act unless the fact that one of the parties is a union exempts the agreement and parties to it from the Sherman Act. Although the Fifth Circuit's majority opinion contains an able review of the history of labor unions' anti-trust immunity, the prior decisions of this Court were not applied. The majority opinion failed to find an anti-trust violation because of the supposed absence of a conspiracy between a union and employer. That majority completely ignored the central point that a conspiracy exists between CONNELL and UNION, and that CONNELL was a further link in UNION's attempts to restrict all mechanical and plumbing work to the favored employers.

This Court has previously held that a union forfeits any anti-trust immunities granted by Sections 6 and 20 of the Clayton Act (15 U.S.C. §17; 29 U.S.C. §52) and Sections 1 and 4 of the Norris-LaGuardia Act (29 U.S.C. §§101 and

104) if that union conspires with an employer to lessen or restrict competition. In *Allen Bradley Co. v. Local 3, IBEW*, 325 U.S. 797 (1945), this Court held violative of the Sherman Act a combination among a union and electrical contractors and manufacturers to lessen and restrict competition in electrical products in New York City. The simple product boycott in *Allen Bradley* pales in comparison to the boycott accomplished by the agreement herein. The agreement between CONNELL and UNION results in an effective boycott of all business enterprises which cannot, or do not, for any reason, adopt UNION's established Master Agreement. Also, the boycott is not limited to any particular construction project — it extends to all future work. The result, then, is that all employers who perform some work over which the UNION claims jurisdiction must become parties, assuming UNION's willingness, to the Master Area Agreement (some fifty-six pages in length) before they can do business with employers such as CONNELL. Since the single subcontract in the construction industry has historically covered both products and labor, they are foreclosed from the marketplace. The boycott here, because of the way contracts are let in the construction industry, essentially extends to all the products that would be covered under any contract for mechanical work that CONNELL signs with any other employer.

Even though UNION's conspiring with CONNELL in itself constitutes a forfeiture of its anti-trust immunity, this Court has held in *Local 189, Amalgamated Meat Cutters v. Jewel Tea Co.*, 381 U.S. 676 (1965), that unions acting alone can violate the Sherman Act if their actions result in a restraint of trade and are not for legitimate labor purposes. In *Jewel Tea*, a restriction on market hours contained in a collective bargaining agreement was held exempt from the Sherman Act, but not because of the lack of conspiracy with nonlabor. Although this Court split in the different *Jewel Tea* opinions, the common teaching of these opinions is that unilateral union action is a violation of the Sherman Act if such action results in a restraint of trade and is not in furtherance of legitimate union objectives. The Court of Appeals erro-

neously found UNION's interest herein legitimate. (Appendix B, p. B-37, infra).

For proper application of the legitimate union interest test, the National Labor Relations Act must be examined and balanced with the Sherman Act. In *Apex Hosiery v. Leader*, 310 U.S. 469 (1940), this Court held that not all unilateral union activities were exempt from the Sherman Act. That case involved a primary strike, but this Court failed to find a Sherman Act violation since the restraint of trade resulted from primary activity. UNION's actions against CONNELL were entirely secondary due to the lack of even the possibility of a collective bargaining reationship. In the case of *Columbia River Packers' Association, Inc. v. Hinton*, 315 U.S. 143 (1942), this Court held that attempts to interfere with the business relations of buyers and sellers of fish would not come within the anti-trust immunities afforded unions. Likewise, UNION's attempts to regulate and control business relations between CONNELL and its subcontractors do not come within the anti-trust immunity. UNION does not seek to represent a single employee of CONNELL, but only to regulate with whom CONNELL does business, wholly outside of any collective bargaining relationship. As this Court stated in *Columbia River Packers*, supra:

> "We recognize that by the terms of the statute there may be a 'labor dispute' where the disputants do not stand in the proximate relation of employer and employee. But the statutory classification, however broad, of parties and circumstances to which a 'labor dispute' may relate does not expand the application of the Act to include controversies upon which the employer- employee relationship has no bearing." 315 U.S. at 146-147.

Judge Clark correctly held in his dissenting opinion that UNION's actions violated the secondary boycott bans of the NLRA, 29 U.S.C. §158(b)(4)B. It is this Act which establishes the parameters of legitimate union activity; therefore, agreements and actions which violate this Act and also result in a restraint of trade cannot and should not be considered legitimate union activity.

Congress, in enacting the Taft-Hartly Act, sought to outlaw the secondary boycott.[7] In *NLRB v. Denver Building Trades Council*, 341 U.S. 675 (1951), this Court recognized the objective of Congress in enacting Section 8(b)(4)(B), formerly Section 8(b)(4)(A), of the NLRA, as amended, stating as follows:

> "In the views of the Board as applied in this case we find conformity with the dual Congressional objectives of preserving the right of labor organizations to bring pressure to bear on offending employers in primary labor disputes and of shielding unoffending employers and others from pressures in controversies not their own." Id at 692.

This case generated annual attempts of construction unions to obtain a "common situs" picketing bill from Congress in order to overrule this Court's *Denver Building Trades* decision. Congress has consistently rejected all such attempts.[8] However, if the type of agreement herein is allowed to continue, unions can escape the decisions of this Court and the intent of Congress simply by picketing a general contractor with whom they have no dispute for a similar agreement and their actions magically become primary. The result will be a stranglehold on the entire construction industry.[9]

[7] Section 8(b)(4)(A) of the Taft-Hartley Act, now Section 8(b)(4)(B) of the National Labor Relations Act, as amended by the Labor Management Reporting and Disclosure Act of 1959, 29 U.S.C. § 158 (b)(4)(B).

[8] Examples are H. R. 9070, H. R. 9089, H. R. 9373, and S. 2643 (86th Congress, 1960); H. R. 10027 (89th Congress, 1965); H. R. 100 (90th and 91st Congress, 1967, 1969); and H. R. 4726 (93rd Congress, 1973).

[9] The questioned agreement is prevalent beyond the one between CONNELL and UNION herein. At the trial of this case, UNION produced evidence that the Los Angeles, California Building and Construction Trades Council has 9,722 similar agreements. The District Court below found in Finding of Fact No. 13, (Appendix A, p. A-4), that UNION had obtained similar agreements from other general contractors in the Dallas area. Attempts of trade unions in Philadelphia to obtain a similar agreement from Altemose Construction Company resulted in approximately $300,000.00 property damage, which actions are the subject of a pending lawsuit, *Altemose v. Building and Construction Trades*, No. 73-773, in the United States District Court for the Eastern District of Pennsylvania. Construction trade unions have also picketed to obtain similar agreements in Florida and Ohio.

Also, the rights granted to employees under Section 7 of the NLRA become illusory as to employees of firms which must do business with CONNELL and other general contractors who sign a similar agreement with a union. This Court recently said in *NLRB v. Savair Manufacturing Company*, U.S. , 94 S. Ct. 495 (1973), "any procedure requiring a 'fair' election must honor the right of those who oppose a union as well as those who favor it. The Act is wholly neutral when it comes to that basic choice. By §7 of the Act, employees have the right not only to 'form, join or assist' unions, but also the right 'to refrain from any or all of such activities.' " Id. at 499.

The type of agreement herein completely negates the rights as to an NLRB conducted election or any other form of self determination by employees of subcontractors who depend on business dealing with general contractors such as CONNELL. Regardless of the desires or rights of his employees, a subcontractor-employer must adopt the Master Agreement with UNION whether his employees like it or not if he is to stay in business. It will make no difference if those employees have previously rejected a union; selected another union and negotiated a contract, or if they simply wish to exercise the right guaranteed by Section 7 of the NLRA to "refrain from any and all such activities." If employees who had the Master Area Agreement forced on them by an employer were dissatisfied, any vote to decertify UNION would be a vote to starve for both employee and employer. Finally, if the union refuses, for any reason, to permit their employer to sign a collective bargaining agreement, he cannot sell his products and they cannot work. Regardless of whether, or to what degree, the union might be guilty of racial, sexual or other discriminatory employment practices, they must continue to be bound to it if they wish to work. Can it be seriously contended that these results are within the employee protections guaranteed by the NLRA?

The overlap and relationship of the anti-trust questions of this case with the NLRA is most ably stated by Judge Clark in his dissent, as follows:

> "When a union seeks to organize those who work for an employer or group of employers there can be no doubt that Congress has granted it freedom from anti-trust proscription to act in concert against such employers in order to bring such employees as may be affected into a unified group of sufficient size to allow the union to deal on a par with management. Congress' balance of the competing interests, as I divine legislative intent, is calculated to produce union peer status, but not union dominance. Therefore, I would hold that where a union bypasses the congressionally sanctioned methods of organizing the employer whose employees it seeks to unite (here, the individual subcontractors) and illegally brings pressure on a neutral, secondary source of work for all such employers within an area (Connell) to force that unrelated economic entity to execute a contract which requires that all directly involved subcontractors bring their work forces into the membership of this local or starve for lack of work, then that union has passed beyond the scope of antitrust immunity." (Appendix B, p. 57, infra).

UNION has, throughout this case, taken the position that the construction industry proviso to Section 8(e) of the NLRA[10] protects this agreement from anti-trust sanctions, and the Federal District Court below so held. The majority of the Court of Appeals refused to decide this issue.

Unless protected by Section 8(e), the agreement is violative of Section 8(b)(4) of the NLRA. If UNION's actions in obtaining the agreement are illegal under 8(b)(4), such actions are certainly not legitimate union actions; therefore, they are violative of the Sherman Act in view of the resulting restraint of trade.

Early in the development of the law regarding labor immunity from anti-trust laws, this Court held that secondary boycotts were illegal restraints of trade and that Section 20 of the Clayton Act did not protect them in *Duplex Printing Press Co. v. Deering*, 254 U.S. 433 (1921), and *Bedford Cut Stone v. Journeymen Stonecutters Association*, 274 U.S. 37 (1927). These cases involved unilateral union actions.

[10] Section 8(e) of the NLRA is set forth in Appendix C, pp. C-3 - C-4.

This Court made an exhaustive study of the construction industry proviso in *National Woodwork Mfrs. Ass'n v. NLRB*, 386 U.S. 612 (1967), and barely, by a 5-4 decision, held that a *primary* subcontracting clause *in a collective bargaining agreement* was protected by the proviso to Section 8(e). In upholding a primary subcontractor clause on the theory that it involved work preservation attempts of carpenters against their own employer, the Court clearly indicated that a secondary subcontractor clause, as presented herein, would not be saved by the 8(e) construction proviso.

In *National Woodwork Mfrs.*, supra, the general contractor, Frouge Corporation, as opposed to CONNELL in the case before this Court, was a *party to the collective bargaining agreement* containing a work preservation clause and Frouge Corporation *hired employees covered by the collective bargaining agreement*. CONNELL is neutral concerning the labor relations of its independent plumbing and mechanical subcontractors, and UNION herein has picketed CONNELL simply to satisfy its objectives of eliminating all companies with which it does not have a collective bargaining agreement. This Court's opinion in *National Woodwork* clearly reveals that the facts presented herein would not be protected by the construction industry proviso to Section 8(e):

> "The determination whether the 'will not handle' sentence of Rule 17 and its enforcement violated § 8(e) and § 8(b) (4) (B) cannot be made without an inquiry into whether, under all the surrounding circumstances, the union's objective was preservation of work for Frouge's employees or whether the agreements and boycott were tactically calculated to satisfy union objectives elsewhere. Were the latter the case, Frouge, the boycotting employer, would be a neutral bystander, and the agreement of boycott would, within the intent of Congress, become secondary." 386 U.S. 643.

This Court further concluded:

> "In effect Congress, in enacting 8(b) (4) (A) of the Act, returned to the regime of *Duplex Printing Press Co.* and *Bedford Cut Stone Co.*" Id at 632.

Thus, as under *Duplex*, unions, acting alone, conducting the secondary boycotts prohibited under the labor law, are not exempt from the Sherman Act if the union's objective is to restrain trade and the product market as has been shown herein.

Not only is the opinion of the majority of the Court below in direct conflict with the above mentioned decisions of this Court, it is also in conflct with the decisions of this Court in the area of preemption of state law as set forth below.

B. THIS COURT SHOULD DETERMINE THE EXTENT TO WHICH STATE ANTI-TRUST LAWS ARE PREEMPTED BY FEDERAL LABOR LAW.

By its decision, the majority of the Court of Appeals has given labor unions an *absolute and unlimited exemption* from all state anti-trust laws. This result was reached because the Court of Appeals ruled, in effect, that *any* activity which can be a labor matter is protected from state anti-trust action by the doctrine of preemption.

Despite the refusal of the majority of the Court of Appeals to even consider any of the labor law issues inherent in this case, that majority, nevertheless, held that the anti-trust laws of Texas were preempted, not by federal anti-trust laws, but *only by federal labor laws*. (Appendix B, p. B-47). Such a result is in direct conflict with this Court's decisions in *Local 24, Int'l Brotherhood of Teamsters v. Oliver*, 358 U.S. 283 (1957) and *Giboney v. Empire Storage & Ice Co.*, 336 U.S. 490 (1949), where this Court held that Federal labor laws act to preempt state law only when the Federal laws apply to a case and are in real conflict with the state law in question. CONNELL submits that the labor law issues must be decided before there can be even consideration, much less application, of the doctrine of preemption.

In *Oliver*, supra, this Court went to great lengths to express the fact that the essence of federal labor policy is the creation and protection of collective bargaining rights of

employers and employees. Since in the present case there is no collective bargaining relationship between UNION and CONNELL, state anti-trust law clearly cannot be in conflict with federal labor laws in this context.

Throughout this case, CONNELL has asserted that the absence of any employer-employee relationship and any collective bargaining relationship is a central issue in the determination of questions of anti-trust immunity. The significance of this issue was established by this Court very clearly in *Hanna Mining Co. v. Marine Engineers Beneficial Ass'n Dis't 2*, 382 U.S. 181 (1965). That case involved the question of whether federal labor law applied to attempts by picketing to force recognition of a union to bargain only for supervisors and whether or not state law was thereby preempted. This Court held that, since supervisors were not employees under the federal labor laws and no other persons defined as employees were involved, the matter was outside the regime of the NLRA, and the preemption doctrine would not apply. The Court also held that the activities of the picketing union, the employer and the supervisors did not fall into any other clearly protected area of federal labor law which would preempt state law.

In *Giboney*, supra, this Court specifically rejected the theory that labor unions and labor related activities enjoy an inherent exemption from state anti-trust regulations. The questioned agreement clearly violates Sections 15.02, 15.03, and 15.04 of the Texas Business and Commerce Code. (Appendix C, pp. C-4 - C-6). It is inconceivable that the Court of Appeals could properly hold state law preempted without properly, first, considering whether UNION's actions and the agreement in issue were sanctioned and protected by Congress and, second, whether any real conflict with state laws existed under the facts in question.

C. THIS CASE PRESENTS VITAL QUESTIONS OF FEDERAL LAW THAT MUST BE DECIDED AND SETTLED BY THIS COURT.

In both the District Court and the Court of Appeals, UNION and CONNELL *both* took the position that many of the basic anti-trust issues involved in this case hinge on the applicability of the construction industry proviso to Section 8(e) of the NLRA.

Union attempts to obtain work preservation objectives for their members *vis-a-vis* their own employers are not at issue herein. The question of obtaining restrictive clauses outside of the employer-employee relationship is presented, and this question should be answered by this Court. The majority opinion of the Court of Appeals correctly concluded that if the questioned Agreement is not protected by the 8(e) proviso, UNION's activities are a classic example of a violation of the secondary boycott bans of the NLRA. (Appendix B, p. B-44, infra). However, the Court of Appeals refused to answer the question, concluding a lack of jurisdiction. The Sherman Act and the NLRA were not balanced since half of the "balancing act" was disregarded. This refusal of the Fifth Circuit to decide the application of Section 8(e) is erroneous not only because the proper test of legitimate union interest requires the answer in order to decide the anti-trust issues, but, further, because the Court of Appeals was aware of the fact that the General Counsel of the National Labor Relations Board has refused to allow the question to be answered by the NLRB. It was noted that the General Counsel of the NLRB had refused to issue a complaint of illegal 8(b)(4) activities involving UNION and another contractor, KAS Construction Company, arising out of the same Agreement as the one in question. (Appendix B. pp. B-6 and B-45). The refusal of the General Counsel of the NLRB to issue a complaint prevents the NLRB from deciding the proper interpretation of the construction industry proviso to Section 8(e) under the facts of this case, and this refusal is unreviewable. *Vaca v. Sipes*, 386 U.S. 171, 182 (1967).

Petitioner is aware of two cases arising out of almost identical facts involving the same Agreement that have been pending with General Counsel of the NLRB for sixteen months. These cases are *Ponsford Bros.*, NLRB Case Nos. 28-CC-417, 28-CC-431 and 28-CE-12, and *Hagler Construction Company*, NLRB Case No. 10-CC-447. Since the decision of the Court of Appeals herein, other cases, *Howard U. Freeman, Inc.*, 16-CC-472 - 16-CC-477, have been filed and are also pending with the NLRB's General Counsel; however, no complaints have been issued although the Fifth Circuit urged that the issue be considered by the NLRB at the next available opportunity (Appendix B, p. B-46).

Two other Circuits have recently been frustrated by the problems of primary jurisdiction concerning labor issues arising in anti-trust cases. The Third Circuit, in *Int'l Ass'n of Heat and Frost Insulators v. United Contractors Ass'n, Inc.*, 483 F. 2d 384 (3rd Cir. 1973), directed the District Court to certify labor questions involved in an anti-trust case to the NLRB for answer. The NLRB, through its General Counsel, is resisting the answering of those questions. In *Carpenters' District Council v. United Contractors Ass'n of Ohio*, ... F. 2d ...., 84 LLRM 2276 (6th Cir. 1973), pet. for reh. pending, the Sixth Circuit also attempted to remand an anti-trust case to the District Court with directions to certify labor issues to the NLRB. The General Counsel of NLRB is also resisting the NLRB's answering those questions; therefore, at least three Circuits are currently frustrated over the question of primary jurisdiction when labor issues are involved in anti-trust cases. The Fifth Circuit's refusal to decide these questions and referring one in the position of CONNELL to a useless remedy is error and a denial of due process of law.

This Court had no problems in deciding the anti-trust cases of *Allen Bradley, Pennington, Ramsey* and *Jewel Tea*, supra, even though those anti-trust cases involved labor issues.

It is submitted that, as Judge Clark held in his dissenting opinion, the construction industry proviso to Section 8(e) of the NLRA does not encompass or protect the Agreement in question. This question should be answered by this Court in this case. The resulting judicial economy and economic savings to employers and employees that will result in the lack of economic warfare in the future over similar agreements make the issues of this case worthy of this Court's resolution.

CONCLUSION

For the reasons set out herein and for the reasons given by Judge Clark in his dissenting opinion in the Court below, this Petition for Writ of Certiorari should be granted.

Respectfully submitted,

Joseph F. Canterbury, Jr.

Counsel for Petitioner

Of Counsel:
SMITH SMITH DUNLAP & CANTERBURY
BOWEN L. FLORSHEIM
On the Petition

CERTIFICATE OF SERVICE

This is to certify that on the 27th day of February, 1974, three true and correct copies of the foregoing Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit were served on Counsel for Respondent by depositing the same in the United States Mail, with First Class postage prepaid, and addressed to Mr. David R. Richards, 600 West 7th Street, Austin, Texas 78701.

Joseph F. Canterbury, Jr.

APPENDIX

APPENDIX A

FINDINGS OF FACT AND CONCLUSIONS OF LAW

(Number and Title Omitted)

Filed: Nov. 9, 1971

This suit was filed in the 134th Judicial District Court of Texas by Connell Construction Company, Inc., v. Plumbers & Steamfitters Local Union No. 100 of the United Association of Journeymen and Apprentices of the Plumbing and Pipefitters Industry of the United States and Canada, AFL-CIO. Plaintiff sought injunctive relief against picketing and a declaratory judgment that the efforts of defendant to obtain a certain contract were illegal. The Defendant filed a petition for removal to this Court, to which petition Plaintiff responded with a motion to remand. This Court denied Plaintiff's motion to remand.

In an amended complaint, Plaintiff alleges that the contract which Defendant seeks to have Plaintiff sign is illegal contending that it violates the Anti-Trust laws of Texas, the Texas Right to Work Law and the Sherman Anti-Trust Act. Plaintiff seeks a permanent injunction against the Defendant from picketing for the purpose of obtaining the contract and for a declaratory judgment that the proposed contract is illegal. Defendant contends the proposed contract is not illegal, being made lawful by Section 8(e) of the Labor-Management Relations Act. Defendant has filed a counterclaim in which it has asked for a declaratory judgment that the contract in question has been authorized by Congress and does not violate any state or federal laws.

Findings of Fact

1. Plaintiff is a Texas Corporation engaged in the building construction business with its principal office located in Dallas County, Texas. It is engaged in interstate commerce, or in a business affecting interstate commerce.

2. Defendant is an unincorporated association, and a labor organization as that term is defined in the National Labor Relations Act and other federal statutes governing labor management relations.

3. Plaintiff does not, and has not, employed plumbers and steamfitters, and at all times material to this case Plaintiff has had no employees who are members of, or who are represented by Defendant.

4. Although, on occasion, an owner may choose to include the mechanical installation of a project in Plaintiff's contract, it is customary for Plaintiff to include the mechanical installations as a portion of its total contract, which mechanical work Plaintiff uniformly subcontracts to other companies or firms.

5. On November 25, 1970, A. B. (Pat) Patterson, representative of Defendant, forwarded to Plaintiff a proposed contract which stated as its purpose:

> "Whereas, the contractor and the union desire to make an agreement applying in the event of subcontracting in accordance with Section 8(e) of the Labor Management Relations Act."

The last paragraph of the proposed contract read as follows:

> "Therefore, the contractor and the union mutually agree with respect to work falling within the scope of this agreement that is to be done at the site of construction, alteration, painting or repair of any building, structure, or other works, that is the contractor should contract or subcontract any of the aforesaid work falling within the normal trade jurisdiction of the union, said contractor shall contract or subcontract such work only to firms that are parties to an executed, current collective bargaining agreement with Local Union 100 of the United Asscciation of Journeymen and Apprentices of the Plumbing and Pipe fitting Industry." (sic).

6. The letter accompanying the proposed contract stated that "the contract was drafted to conform to the provisions of Section 8(e) of the Labor Relations Act." Said letter and proposed contract were received by Plaintiff on December 3, 1970.

7. In the past Plaintiff has subcontracted the mechanical installation of its construction projects to some firms which do not have a Collective Bargaining Agreement with Defendant as well as some firms which do have such an agreement with Defendant.

8. On or about January 15, 1971, Defendant, not having heard from Plaintiff, picketed a construction site of Plaintiff located at 8700 Stemmons Freeway, Dallas, Texas, where Plaintiff was constructing a multi-story office building. Such picketing was conducted by a single picket and was not attended by any violence.

9. The sign carried by a member of Defendant read as follows:

> "Connell Construction Co.
> Gen. Cont.
> Does not have a
> Subcontract with
> U.A.P.P. Local 100
> We are picketing the
> Above employer only."

10. Defendant's picketing of Plaintiff's job site was for the purpose of obtaining Plaintiff's signature to the contract form set out above and which was introduced as Px 3.

11. When Defendant's picket appeared at Plaintiff's job site some of the employees of Plaintiff and of its sub-contracors left the job site and refused to work.

12. For a period in excess of ten years Plaintiff has on occasion subcontracted mechanical work to a firm known as Texas Distributors, with which Defendant has no Collective Bargaining Agreement.

13. Defendant has picketed other general contractors in the Dallas area and an agreement similar to the one involved herein has been obtained from some of these contractors.

14. The picket placed by Defendant on Plaintiff's job site remained from the 15th of January, 1971 until the 21st of January, 1971, when such picketing was restrained by the Judge of the 134th District Court of Dallas County, Texas.

15. On March 28, 1971, Plaintiff and Defendant signed a contract containing a provision "that if Contractor should contract or subcontract any of the aforesaid work falling within the normal trade jurisdiction of Union, said Contractor shall contract or subcontract such work only to firms that the parties to an executed current collective bargaining agreement with Local Union 100 . . ."

16. The contract signed by the parties also provided "that Contractor — has entered into this agreement under protest and that said Contractor has instituted proceedings to test the legality of this Agreement."

17. Thereafter Plaintiff lost two jobs in which the successful Contractor contracted with Texas Distributors, a non union company, to perform the mechanical work.

18. At the time Defendant sent the contract in question to Plaintiff, Defendant had agreements with some 75 contractors in the Dallas area.

19. Defendant sent a similar contract to the one involved in this case to K.A.S. Construction Company in Richardson, Texas, and picketed the company. K.A.S. refused to sign the proposed agreement and made a complaint to the Regional National Labor Relations Board in Fort Worth, Texas. NLRB refused to issue a complaint and appeal was filed with the General Counsel of the NLRB in Washington. On August 30, 1970, the appeal was denied by the General Counsel.

Conclusions of Law

1. Section 8(e) of the Labor Management Act being directly involved in the allegations of Plaintiff's complaint the motion to remand was properly denied.

2. Plaintiff seeks to invalidate a contract which Defendant contends was drafted to conform to the provisions of Section 8(e) of the Labor Management Act. The legality of the proposed contract under Section 8(e) is a federal question giving this Court jurisdiction.

3. The subcontractor clause is authorized and protected by the proviso of Section 8(e) of the National Labor Relations Act. *Construction Laborers Local 383 v. NLRB*, 323 F2d 433 (9th circ. 1963).

4. The contract being protected by the proviso to Section 8(e) of the Act picketing to secure it is not unlawful. 323 F2d 422 (9th Circ. 1963). *Orange Belt District Council of Painters v. NLRB*, 328 F2d 534 (D.C. Circ. 1964); *Los Angeles Building & Construction Trade Council*, 183 NLRB No. 102 (1970).

5. The legislative history of Section 8(e) clearly shows the intent of Congress. The Norris-La Guardia Act enacted in 1932 "established that the allowable area of union activity was not to be restricted — to an immediate employer-employee relation." *U. S. v. Hutcheson*, 312 U.S. 219, 231. Section 13(c) of the Norris-La Guardia Act provided that the term labor dispute and thus the scope of immunity "includes any controversy concerning terms or conditions of employment — *regardless of whether or not the disputants stand in the proximate relation of employer and employee.*" 47 Stat. 73 (Emphasis added).

Labor abuses of this broad immunity resulted in the Taft-Hartley Act prohibitions against secondary activities contained in Section 8(b)(4)(A), which as amended in 1959

is now Section 8(b)(4)(B). The Landrum-Griffin Act of 1959 did not expand Section 8(b)(4)(A). Section 8(e) in Landrum-Griffin was clearly a compromise. It does not expand the type of conduct condemned by Section 8(b)(4)(B), but in the proviso it exempts the construction industry from such prohibitions, indicating an intention by Congress to return to the broad provisions of Norris-La Guardia to enlarge the scope of immunity, "regardless of whether the disputants stand in the proximate relation of employer and employee." *Woodwork Manufacturer v. NLRB*, 386 U.S. 612 (1967).

6. Labor legislation is "to a marked degree, the result of a conflict and compromise between strong contending forces and deeply held views on the role of organized labor in the free economic life of the Nation and the appropriate balance to be struck between the uncontrolled power of management and labor to further their respective interests." *Local 976, United Brotherhood of Carpenters v. Labor Board*, 357 U.S. 93, 99-100, The proviso of Section 8(e) is clearly the result of conflict and compromise and was "added to preserve the status quo in the construction industry and exempt the garment industry from the prohibitions of Sec. 8(e) and 8(b)(4)(B)" *Woodwork Manufacturers v. NLRB*, *supra*.

7. The agreement in question being authorized by Congress such a contract does not violate Federal Anti-Trust statutes. *Suburban Tile v. Rockford Building Trades Council*, 354 F. 2d 1 (7th Cir. 1965).

8. The states are not free to regulate conduct which is the subject of federal regulation and the contract in question does not violate Texas Anti-Trust laws or the Texas Right to Work Law.

9. The Plaintiff, Connell Construction Company, Inc., is not entitled to an order enjoining Defendant, its agents and members from picketing to obtain the contract in question.

10. The contract in question is found to be legal and in conformity with Section 8(e), 29 U.S.C. Section 158(e).

(Signed) SARAH T. HUGHES
United States District Judge

JUDGMENT

Filed: Nov. 18, 1971

In the United States District Court
For the Northern District of Texas
Dallas Division

Connell Construction Company, Inc.
Civil Action

versus

No. CA 3-4455-B

Plumbers and Steamfitters Local Union No. 100 of the United Association of Journeymen and Apprentices of the Plumbing and Pipefitters Industry of the United States and Canada, AFO-CIO

This action came on for trial on the merits before the Honorable Sarah T. Hughes, United States District Judge, on the 12th day of October, 1971, and the Court having heard and considered the evidence and stipulations of the parties and duly considered the briefs and arguments of counsel, and all the issues herein having been duly tried, and the Court having jurisdiction of this cause, therefore, in accordance with the findings of fact and conclusions of law heretofore signed and entered by the Court, it is

ORDERED, ADJUDGED, DECREED and DECLARED:

(1) that the declaratory and injunctive relief sought by the Plaintiff be denied and Plaintiff take nothing by its action;

(2) the Defendant is granted declaratory relief pursuant to the provisions of 28 U.S.C., Section 2201 and the contract in question is declared to be legal and in conformity with Section 8(e) of the Labor Management Relations Act as amended and further said contract is declared not to be in violation of either the Texas anti-trust laws or the Texas right-to-work law;

(3) the Defendant shall recover of the Plaintiff its cost of action;

(4) To all of which action, Plaintiff excepted.

Signed and entered this 16th day of December, 1971.

(Signed) SARAH T. HUGHES
Sarah T. Hughes
United States District Judge

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 72-1243

CONNELL CONSTRUCTION COMPANY, INC.,
Plaintiff-Appellant,

versus

PLUMBERS AND STEAMFITTERS LOCAL UNION NO. 100, ETC.,
Defendant-Appellee.

Appeal from the United States District Court for the Northern District of Texas

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(August 22, 1973)

Before MORGAN, CLARK and INGRAHAM, Circuit Judges.

MORGAN, Circuit Judge: This action is brought by Connell, a general contractor, against Plumbers Local 100, alleging that a contract with that union which Connell entered under pressure from the union violates the antitrust laws. After trial, the District Court for the Northern District of Texas held for the defendant union, finding that Congress had, in amendments to the National Labor Relations Act, expressly recog-

nized the validity of contracts such as the one in issue as a legitimate union tool in the construction industry. Connell appeals from that judgment.

I

Connell is a general contractor engaged in the construction industry in Texas. Connell was first contacted by the union and asked to enter a contract with the union whereby Connell agreed not to do any business with any plumbing and mechanical firm unless such firm was a party "to an executed, current collective bargaining agreement" with the union.[1] This initial missive from the union indicated that if Connell did not sign within 10 days, the union would undertake to place pickets at various construction sites where Connell was the general contractor. When Connell failed to sign this proposed contract, the union placed a single picket at The Bruton Venture Project in Dallas, Texas, on which Connell was the general contractor.

[1]The text of the proposed agreement was as follows:

> WHEREAS, the contractor and the union desire to make an agreement applying in the event of subcontracting in accordance with Section 8(e) of the Labor-Management Relations Act;
>
> WHEREAS, it is understood that by this agreement the contractor does not grant, nor does the union seek, recognition as the collective bargaining representative of any employees of the signatory contractor; and
>
> WHEREAS, it is further understood that the subcontracting limitation provided herein applies only to mechanical work which the contractor does not perform with his own employees but uniformly subcontracts to other firms;
>
> THEREFORE, the contractor and the union mutually agree with respect to work falling within the scope of this agreement that is to be done at the site of the construction, alteration, painting or repair of any building, structure, or other works, that if the contractor should contract or subcontract any of the aforesaid work falling within the normal trade jurisdiction of the union, said contractor shall contract or subcontract such work only to firms that are parties to an executed, current, collective bargaining agreement with Local Union 100 of the United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry.

Upon the commencement of this picketing about 150 employees (both of Connell and its various subcontractors) left the site of this project, effectively halting construction. In January of 1971, Connell instituted this action in a Texas state court alleging a violation of the Texas antitrust laws. The Texas court granted a temporary injunction against the picketing. The union then removed the case to federal court and, after the district court refused to remand the case back to state court, Connell entered, under protest, an agreement not to do any business with subcontractors who did not have a current collective bargaining agreement with the union. It is this agreement, substantially what the union sought through its picketing, that Connell alleges to be an antitrust violation.

Connell did not have any employees of its own who were members of the appellee union at the time of the demand to contract and the picketing. In fact, Connell has never at any time material to this case had any of its own employees who belonged to this union. The subcontractor who was being used by Connell at The Bruton Venture Project did, in fact, at that time have a current collective bargaining contract with the union.

It is undisputed that Connell itself is in the practice of virtually always contracting out the mechanical work on its construction jobs. It appears that this subcontracting is generally done on the basis of bids from various mechanical subcontractors. Connell has in the past given these jobs to both unionized and non-unionized subcontractors on approximately an equal basis.

II

It becomes readily apparent that while this case is framed in the terms of antitrust, its origins and implications are most intimately connected with and extremely important to the delicate balance of labor-management power in the construction industry and national labor policy pertaining thereto. This is in a sense a labor problem and must be analyzed in light of national labor policy as set forth by Congress. The antitrust aspects of the case are bottomed on the claim that the union is undertaking to restrict competition by forcing this general contractor through contract with the union to give all its work to unionized subcontractors. It is such a contract which Connell claims restricts trade and violates the antitrust laws.

III

The instant proceeding is not the first round in the battle over the issues involved in this case. Some knowledge of the background of this action would appear helpful in putting it into proper perspective.

The instant action has more far reaching effects than merely this proceeding. It is another phase of the struggle between the trade unions in the construction industry and general contractors in Dallas. We know of at least two earlier legal proceedings.

In *Dallas Building Trades* v. *NLRB*, D.C. Cir. 1968, 396 F.2d 677, a similar subcontractor agreement was before the District of Columbia Circuit on petition for enforcement of an NLRB order. Members of the Dallas Building Trades Council had picketed a general contractor to obtain a subcontractor agreement like the one in this case. That general contractor, unlike Connell, had employees who were not union members doing work at the picketed jobsite and who would be covered by the agreement with the union. The only violation found by the Board and upheld by the District of Columbia Circuit was based on the fact that this general contractor had unorganized employees. It was held that while picketing for the contract was legal, there was also sufficient evidence to support a finding that the picketing was recognitional in nature, in addition to seeking the subcontractor agreement, and that such picketing, where *an object* was recognition, was limited by section 8(b)(7) of the NLRA to 30 days, which time had been exceeded by the union in this case. The council and its constituent members then turned to picketing contractors who had no employees of their own who could be covered by the agreement to avoid the recognitional problem.

The general contractors then apparently sought to challenge this picketing of generals without any employees of their own who could be covered. As set forth

by the district court in this case, there has been an attempt to take the very issue involved in this action to the NLRB in the form of a labor dispute.

This same union sent a contract similar to the one in this case to K.A.S. Construction Company in Richardson, Texas, and, following that general contractor's refusal to sign the proposed agreement, commenced picketing. K.A.S. sought to bring an unfair labor practice proceeding. The regional office of the NLRB in Fort Worth refused to issue a complaint against the union and an appeal of this refusal was denied by the General Counsel of the NLRB in Washington. Although it has apparently never been expressly adjudicated, it is generally accepted that a decision by the General Counsel not to file a complaint is unreviewable. See Cox and Bok, Cases on Labor Law 138 (7th Edition 1969). Therefore, as long as the regional director and the General Counsel refuse to issue a complaint, a general contractor such as Connell has no way through the processes set up by the NLRA to challenge before the Board or in court the picketing and other economic sanctions used by a union in seeking an agreement such as the one herein.

Having thus failed to obtain an adjudication of this agreement from the NLRB in the context of a labor law issue, the general contractors sought a new line of attack. When Connell was faced with the same demand as K.A.S. earlier, it made no attempt to invoke NLRB procedures but took a different course — antitrust attack.

IV

The first question which we face in this case is whether or not this action can be maintained under federal antitrust statutes. After careful consideration, we find that it cannot be. Labor unions enjoy no blanket exemptions from the antitrust laws. See *United Mine Workers* v. *Pennington*, 381 U.S. 657 (1965); *United States* v. *Hutcheson*, 312 U.S. 219 (1941). They do, however, have a somewhat special status in the realm of antitrust. The test, as it has come down in various Supreme Court opinions, seems to turn on the union's combination with non-labor groups to create a monopoly among various conspiratory interests. In other words, the purposes sought by the conspiracy must have goals which go beyond legitimate union aims and result in an anticompetitive situation.

As a basic proposition, it is usually stated that: "The antitrust laws are not concerned with competition among laborers or with bargains over the price or supply of labor — its compensation or hours of service or the selection and tenure of employees." Cox, *Labor and the Antitrust Laws*, 14 Pa.L.Rev. 252, 255 (1955).

Originally, in the area of antitrust and labor, the Supreme Court broadly applied antitrust law to union activities. However, the clear trend in recent years has been to grant labor a broad exemption from antitrust sanctions, applying the latter only in narrowly limited situations. Examples of the early Supreme Court position include *Loewe* v. *Lawlor* (Danbury Hatters), 208 U.S. 274 (1908), wherein an employer was allowed to sue under the Sherman Act when a union

exerted pressure on him to unionize by a nation-wide boycott. Next Congress enacted sections 6 and 20 of the Clayton Act[2] which, at the time, were generally

[2]Sec. 6. That the labor of a human being is not a commodity or article of commerce. Nothing contained in the anti-trust laws shall be construed to forbid the existence and operation of labor, agricultural, or horticultural organizations, instituted for the purposes of mutual help, and not having capital stock or conducted for profit, or to forbid or restrain individual members of such organizations from lawfully carrying out the legitimate objects thereof; nor shall such organizations, or the members thereof, be held or construed to be illegal combinations or conspiracies in restraint of trade, under the anti-trust laws.

• • •

Sec. 20. That no restraining order or injunction shall be granted by any court of the United States, or a judge or the judges thereof, in any case between an employer and employees, or between employers and employees, or between employees, or between persons employed and persons seeking employment, involving, or growing out of, a dispute concerning terms or conditions of employment, unless necessary to prevent irreparable injury to property, or to a property right, of the party making the application, for which injury there is no adequate remedy at law, and such property or property right must be described with particularity in the application, which must be in writing and sworn to by the applicant or by his agent or attorney.

And no such restraining order or injunction shall prohibit any person or persons, whether singly or in concert, from terminating any relation of employment, or from ceasing to perform any work or labor, or from recommending, advising, or persuading others by peaceful means so to do; or from attending at any place where any such person or persons may lawfully be, for the purpose of peacefully obtaining or communicating information, or from peacefully persuading any person to work or to abstain from working; or from ceasing to patronize or to employ any party to such dispute, or from recommending, advising, or persuading others by peaceful and lawful means to do so; or from paying or giving to, or withholding from, any person engaged in such dispute, any strike benefits or other moneys or things of value; or from peaceably assembling in a lawful manner, and for lawful purposes; or from doing any act or thing which might lawfully be done in the absence of such dispute by any party thereto; nor shall any of the acts specified in this paragraph be considered or held to be violations of any law of the United States.

believed to give unions broad exemptions from anti-trust laws. In *Duplex Printing Press Co.* v. *Deering*, 254 U.S. 443 (1921), the Supreme Court held that section 6 of the Clayton Act only protected the existence and lawful activities of union organizations and that section 20 prevented the application of the antitrust laws only to a labor dispute between employees and their immediate employer. The activity in that case was not within either of these definitions so it was held violative of the antitrust provisions. In some instances *Duplex* has some similarities to this case because here we do not have the immediate employer and there is a question as to whether these are "lawful" activities under the National Labor Relations Act. Also, *Duplex* involved a secondary boycott.

Then, in 1932, the Norris-LaGuardia Act was enacted. Norris-LaGuardia removed the power of courts to issue injunctions in a case involving or growing out of a labor dispute except in cases explicitly outlined in the Act. Section 13(c)[3] stated that the limitation was applicable whether or not the dispute was between employees and their particular employer, thus, striking directly at the *Duplex* decision.

[3](c) The term "labor dispute" includes any controversy concerning terms or conditions of employment, or concerning the association or representation of persons in negotiating, fixing, maintaining, changing, or seeking to arrange terms or conditions of employment, regardless of whether or not the disputants stand in the proximate relation of employer and employee.

The Supreme Court continued to apply the Sherman Act, however, in cases where the union combined with an employer. See *Teamsters Local 167* v. *United States*, 291 U.S. 293 (1934). That case involved conspiracy between Local 167 and the Slaughterers to fix prices and divide territories. The Supreme Court upheld an injunction on the ground that the combination there to monopolize commercial activities had little immediate connection with the needs of the union.

Soon thereafter the tide began to change and antitrust laws were applied far less stringently to labor unions. The first important case in this regard was *Apex Hosiery* v. *Leader*, 310 U.S. 469. The union had struck the employer in quest of its desire for a union closed-shop clause. The strikers seized the plant and locked the employer out. The Court held that this was not within the Sherman Act and intimates that no matter how reprehensible the conduct, that alone cannot make it an antitrust violation. The court pointed out that Congress had repeatedly passed laws trying to take unions out of the scope of the antitrust laws. Furthermore, this was not a case where a labor organization was being used by a combination of those engaged in an industry as the means or instrument for suppressing competition or fixing prices. 310 U.S. at 501. The Court said that here, while the union's actions would result in the removal of the manufacturer's products from interstate commerce, this was not attempted as a device to restrict competition, but rather was designed to achieve legitimate union aims:

Strikes or agreements not to work, entered into by laborers to compel employers to yield to their demands, may restrict to some extent the power of employers who are parties to the dispute to compete in the market with those not subject to such demands. But under the doctrine applied to non-labor cases, the mere fact of such restrictions on competition does not in itself bring the parties to the agreement within the condemnation of the Sherman Act. Appalachian Coals v. United States, supra (288 US 360, 77 L ed 829, 53 S Ct 471). *Furthermore, successful union activity, as for example consummation of a wage agreement with employers, may have some influence on price competition by eliminating that part of such competition which is based on differences in labor standards.* Since, in order to render a labor combination effective it must eliminate the competition from non-union made goods, see American Steel Foundries v. Tri-City Cent. Trades Council, 257 US 184, 209, 66 L ed 189, 199, 42 S Ct 72, 27 ALR 360, *an elimination of price competition based on differences in labor standards is the objective of any national labor organization.* But this effect on competition has not been considered to be the kind of curtailment of price competition prohibited by the Sherman Act. See Levering & G. Co. v. Morrin, 289 US 103, 77 L ed 1062, 53 S Ct 549, supra; cf. American Steel Foundries Case, supra (257 US 209, 66 L ed 199, 42 S Ct 72, 27 ALR 360); National Asso. of Window Glass Mfrs. v.

United States, 263 US 403, 68 L ed 358, 44 S Ct 148. 310 U.S. at 503-04 (Emphasis supplied).

So, while basically this case established that combinations between employers were not restraints, the language set out above also relates to the general anticompetitive result of every union contract with an employer.

The next year the Supreme Court decided a landmark case on labor's combination with non-union groups and the applicability of the antitrust laws thereto. In *United States* v. *Hutcheson*, 312 U.S. 219 (1941), Justice Frankfurter addressed the question of the use of conventional peaceful activities by a union against an employer in a dispute with a rival union as an antitrust violation. In the underlying dispute, the union was having difficulty with the employer over assignment of certain contested work. To achieve its ends, the union engaged in primary and secondary activities. The strike activities were directed against the employer's product as well as the employer and the contractors who were doing the disputed work.

In a well-reasoned opinion, Mr. Justice Frankfurter reviewed the history of labor unions and the antitrust laws in both the courts and Congress. In an oft-quoted passage he states:

> *So long as a union acts in its self-interest and does not combine with non-labor groups, the licit and the illicit under section 20 are not to be distinguished by any judgment regarding the wisdom or unwisdom, the rightness or wrong-*

> *ness, the selfishness or unselfishness of the end of which the particular union activities are the means.* There is nothing remotely within the terms of section 20 that differentiates between trade union conduct directed against an employer because of a controversy arising in the relation between employer and employees, as such, and conduct similarly directed but ultimately due to a internecine struggle between two unions seeking the favor of the same employer. (Emphasis supplied). 312 U.S. at 232.

The Court went on to find the conduct involved was expressly protected by section 20 of the Clayton Act. Finally, the Court stated that Norris-LaGuardia was intended by Congress to reestablish the broad labor union exemption which it thought it had written in section 20 of the Clayton Act but which had been frustrated by the courts in cases such as *Duplex*. Id. at 236.

As might be expected, cases subsequent to *Hutcheson* have explored and refined the exception therein that whenever a union conspired with a non-labor group in restraint of trade, the broad exemption of labor unions from the antitrust laws was not applicable. In *Allen-Bradley* v. *I.B.E.W. Local 3*, 325 U.S. 797 (1945), the Supreme Court applied the *Hutcheson* exception to find a union guilty of antitrust violation. The evidence established that the electrical union became partners with electrical manufacturers and independent contractors in the City of New York to create a monopoly for all three. It obtained various closed

shop agreements from contractors and manufacturers which by cross-obligations required the contractors to buy equipment only from manufacturers having a current bargaining agreement with the local and, in turn, obligated those manufacturers with regard to sales in the Metropolitan New York area to sell only to independent contractors having current agreements with the local. Over time, these individual agreements expanded into an area-wide, industry-wide undertaking with the contractors, manufacturers and union jointly participating to fix prices and control recalcitrant members. The resulting monopoly brought great success to the contractors, manufacturers and the union.

Noting that the agreement here would clearly be an antitrust violation without the presence of the union, Mr. Justice Black went on to frame the question before the Court quite precisely:

> Our problem in this case is therefore a very narrow one — do labor unions violate the Sherman Act when, in order to further their own interest as wage earners, they aid and abet businessmen to do the precise things which that Act prohibits?

Following a review of the legislative and judicial history of labor unions and antitrust, the Court directly addressed the problem of reconciling two declared congressional policies — preservation of a competitive business economy and the rights of labor to organize to better its condition.

The ultimate resolution of these competing policies was stated quite clearly:

> . . . we think Congress never intended that unions could, consistently with the Sherman Act, aid non-labor groups to create business monopolies and control the marketing of businesses and services. 325 U.S. at 808.

In further commentary the Court made expressly clear that the antitrust exemption was lost only because of the obvious violation by the business interest:

> The primary objection of all the Anti-trust legislation has been to preserve business competition and to proscribe business monopoly. It would be a surprising thing if Congress, in order to prevent a misapplication of that legislation to labor unions, had bestowed upon such unions complete and unreviewable authority to aid business groups to frustrate its primary objective. For if business groups, by combining with labor unions, can fix prices and divide up markets, it was little more than a futile gesture for Congress to prohibit price fixing by business groups themselves. *Id.* at 809-10.

The Court went on to reaffirm the principles of *Apex Hosiery* and *Hutcheson* that most labor union activities, while they restrain trade, have been lifted out of the Sherman Act and that the Act draws no distinction between the restraints affected by violations and those achieved by peaceful means with the resulting maxim that courts were not to determine a union's exemp-

tion by the wisdom or unwisdom or the rightness or wrongness of the end sought by the unions.

In recent years the Supreme Court has had to struggle with the problem of balancing these recognized congressional objectives. Two cases decided the same day which involve this issue of a union's antitrust exemption sufficiently illustrate the difficulty the Court has had in trying to reconcile and accommodate policies which must obviously conflict at some point.

In *United Mine Workers* v. *Pennington*, 381 U.S. 657 (1965), small independent coal producers instituted a Sherman Act attack against the Mine Workers alleging that through an industry-wide collective bargaining agreement setting a minimum wage scale the union and large coal mine operators had conspired to establish production costs so high that small producers would be driven from the market leaving a monopolistic situation for the large producers. The Court, with three fragmented opinions,[4] held that the small coal miners had stated a cause of action under the antitrust statutes. In the opinion of the Court, Justice White reaffirmed the mandate of *Hutcheson* which forbade unions from conspiring with employers to eliminate competition. The Court reaffirmed its earlier conclusion that Congress had recognized unions as a legitimate anticompetitive organization while recognizing

[4]Justice White delivered what was styled as the majority opinion, with Chief Justice Warren and Justice Brennan concurring in his opinion. Justice Douglas, with Justices Black and Clark agreeing, concurred with an opinion. Justices Goldberg, Harlan and Stewart dissented from the opinion but concurred in the result.

that unions might demand the same settlement from all employers in an industry as long as that demand was based solely on internal policy decisions by the union. The Court held that unions forfeited their antitrust immunity when:

> It is clearly shown that [the union] has agreed with one set of employers to impose a certain wage scale on other bargaining units. One group of employers may not conspire to eliminate competitors from the industry and the union is liable with the employers if it becomes a party to the conspiracy. This is true even though the union's part in the scheme is an undertaking to secure the same wages, hours or other conditions of employment from the remaining employers in the industry. 381 U.S. 665-66.

In his concurrence, Justice Douglas relied heavily on *Allen-Bradley* and the participation by a union in a scheme to create a monopoly for employers. The special opinion of Justice Goldberg is discussed more fully below.

As noted, on the same day the Court issued another opinion concerning the relationship of labor unions to the antitrust laws. *Meat Cutters Union* v. *Jewel Tea Co.*, 381 U.S. 676 (1965). Again the Court split into the same three camps evident in *Pennington* with the factions led by Justices White and Goldberg reaching the same result through separate analyses, but with Justice Douglas' group dissenting with a separate opinion.

The Chicago area meat cutters had obtained collective bargaining agreements with an association representing virtually all retail food outlets which restricted the hours for sale of fresh meat to the period between 9:00 A.M. and 6:00 P.M. *Jewel Tea* signed the agreement under protest and then instituted antitrust action alleging that this restriction unduly restricted competition because it prohibited markets the choice of continuing to retail meat, even pre-packaged meat, after 6:00 P.M. They alleged the ability to retail after 6:00 P.M. was an important competitive device and that it was not sufficiently connected with union aims to avoid antitrust prohibition.

In an opinion for three Justices, Mr. Justice White first pointed out that in this case there was absolutely no issue remaining of a union-employer conspiracy and framed the question thusly:

> It is well at the outset to emphasize that this case comes to us stripped of any claim of a union-employer conspiracy against Jewel. The trial court found no evidence to sustain Jewel's conspiracy claim and this finding was not disturbed by the Court of Appeals. We therefore have a situation where the unions, having obtained a marketing hours agreement from one group of employers, have successfully sought the same terms from a single employer, Jewel, not as a result of a bargain between the unions and some employers directed against other employers, but pursuant to what the unions deemed to be in their own best interest. 381 U.S. at 688.

Apparently taking the position that the absence of proof of a conspiracy was not fatal to the plaintiffs, Justice White turned to consider whether the agreement over hours of operation sought by the union could be termed a "legitimate union interest". To determine whether or not this demand could be so characterized, Justice White turned to "consider the subject matter of the agreement in the light of the national labor policy." *Id.* at 689.

In pointing out the factors which he felt were controlling on this issue, Justice White stated:

> The crucial determinant is not the form of the agreement — e.g., prices or wages — but its relevant impact on the product market and the interests of union members. *Id.* at 690, n. 5.

He then goes on to evaluate the union's demand and determine that the union had a legitimate interest in seeking this restriction from the employer, despite its strong anticompetitive result.

In a lengthy concurrence in the result in *Jewel Tea*, which also served as a concurrence in *Pennington*, Justice Goldberg expounded on what he felt was the proper view of the balance to be struck between labor unions and antitrust law. Justice Goldberg's basic complaint with Justice White's opinion centered on his belief that continued intervention by courts under the guise of antitrust was nothing more than a throwback to the days when courts with impunity had substituted their own economic judgment for the balances struck

by Congress. He points out that Congress has repeatedly amended the labor laws, not the antitrust laws, to cover activities which it has found in its legislative judgment to be detrimental to the public interest.

A distillation of his position illustrates that he feels Congress has removed from the courts the power to review labor-employer agreements wherever that involves passing on the economic judgments contained therein. While he disagreed with the use of the conspiracy test, he still added: "Even if an independent conspiracy test were applicable to the *Jewel Tea* situation, the simple fact is that multi-employer bargaining at arms length does not constitute union abetment of a business combination." 381 U.S. at 726. Justice Goldberg, thus, takes the position that where no conspiracy is alleged there can be no antitrust violation.

In a short dissent, Justice Douglas argues that the collective bargaining agreement itself was evidence of a conspiracy between the retailers and the union. Relying heavily on what he considered the true teaching of *Allen-Bradley*, Justice Douglas took the position that the contract constituted an antitrust violation because of the multi-employer aspect of the agreement. Since this multi-employer contract establishes an agreement between competing employers which they could never enter on their own, Justice Douglas rejects the idea that the presence of the labor union will immunize the agreement. He states:

> The unions here induced a large group of merchants to use their collective strength to hurt

> others who wanted the competitive advantage of selling meat after 6 p.m. Unless Allen-Bradley is yet overruled or greatly impaired, the unions can no more aid a group of businessmen to force their competitors to follow uniform store marketing hours than to force them to sell at fixed prices. Both practices take away the freedom of traders to carry on their business in their own competitive fashion. 381 U.S. at 737.

Thus, after *Jewel Tea*, there appears to be arguably a two-fold test for determining a union's antitrust exemption. It is clear that wherever the complaint alleges a conspiracy between labor and non-labor groups to injure the business of another non-labor group the exemption is not available. Justice White's opinion in *Jewel Tea* suggests that even where there is no allegation of conspiracy the union cannot claim exemption from the antitrust laws if the agreement it seeks does not encompass a "legitimate union interest". We will discuss each of these as they relate to the facts presented in this case.

V

Prior to *Jewel Tea*, the Supreme Court cases such as *Allen-Bradley* suggested that the sole test to be applied in determining a union's antitrust exemption was whether or not the labor union had entered into a conspiracy with non-labor groups to achieve the sort of anti-competitive arrangement for those business groups which Congress had expressly addressed in the

antitrust laws. Since the *Jewel Tea* decision this court has had an opportunity to address the conspiracy element of a union's antitrust exemption.

In *Cedar Crest Hats, Inc. v. United Hatters,* 5 Cir. 1966, 362 F.2d 322, this court set forth its interpretation of the conspiracy test:

> In order for union activity to constitute a violation of the antitrust laws in the circumstances here presented, there must be a combination of union and non-union business groups to create a monopoly, resulting in a restraint of trade or interstate commerce . . . . In other words, the union must join in a conspiracy *to create a monopoly among fellow-conspiratory business interests.* This interpretation is reinforced by the statement of Mr. Justice Black in Allen-Bradley at 325 U.S. 809, 65 S.Ct. 1539, 89 L.Ed. 1948. that "Employers and the union did here make bargaining agreements in which the employer agreed not to buy goods manufactured by companies which did not employ the members of Local 3. *We may assume that such an agreement standing alone would not have violated the Sherman Act.*" (Emphasis added). *We*, in turn, may assume that where a union acts solely in its own self-interest and makes no attempt to create a monopoly there is no antitrust violation. *Id.* at 326.

Furthermore, in *Cedar Crest* this circuit, in an opinion by Judge Gewin, stated that in order to maintain an antitrust action against the union it is necessary to

"prove facts showing that the union conspired with certain business interests to create a monopoly for such business interests." *Id.* at 327.

The complaint of Connell in this case contains no allegation of this union's participation in a scheme or conspiracy with a non-labor group to create a monopoly for that non-labor group. In fact, Connell bases its claim on the ground that this contract simply restricts the way in which it is free to carry out its business. It is Connell itself which is alleging serious injury from the agreement despite the fact that it is indeed the sole non-labor party to the agreement. There is no allegation of any conspiracy between the union and unionized subcontractors nor does the proof allude to any such conspiracy. In fact, at trial counsel for the union directly cross-examined the employer's witness in chief, Mr. Thomas Stewart, president of Connell Construction, on the point of a union conspiracy. The following colloquy took place:

Q Do you recall the taking of your deposition? Do you, Mr. Stewart?
A Yes.
Q I asked you at that time if you had any information whether Local 100 had reached some understanding, or entered into some conspiracy with mechanical contractors in the area to try to drive Texas Distributors, or anyone else, out of business. Do you recall me asking you that question?
A Yes.
Q And what was your answer to it?

A Not to my knowledge, I believe.
Q You have no information concerning anything like that?
A No.
Q I asked you at the time of your deposition whether you had any information, direct or indirect, of the existence of a plan, or agreement between Local 100 and other contractors, whether they be general contractors, or mechanical contractors, whereby Local 100 will undertake to create a monopoly in the Dallas area for certain contractors. Do you recall me asking that question?
A Yes.
Q And what was your answer if you recall?
A "Not to my knowledge."
Q And that is your testimony today?
A Yes.

Further questioning by Connell's own counsel established clearly that plaintiff was basing its entire case on the theory that there was a sufficient antitrust violation because the union had restricted Connell in the way that it carried on its business. The only mention of conspiracy denominated Connell as the sole non-labor conspirator.

Such a conspiracy allegation is clearly not the kind which faced the Supreme Court in *Pennington* and the other antitrust conspiracy cases. The only non-labor group with which the union is alleged to have "conspired" is the very party who now tries to bring the

antitrust suit alleging serious injury. This seems to be strong evidence that at least with regard to the contract with Connell, the union was acting in its own self-interest and that no monopoly was being formed with Connell, the only non-labor group with whom the union is alleged to have "conspired". Therefore, Connell has made out no sufficient claim of conspiracy to get beyond the union's antitrust exemption. We are thus left with a situation quite similar to *Jewel Tea* in that, once the conspiracy to monopolize drops out, the only remaining claim of plaintiff is that the agreement interferes with his right to conduct his business as he wishes and that the contract requires him to forego certain methods of competition.

VI

From the thicket of *Jewel Tea*, a lower court is left with a feeling that mere failure to allege and prove conspiracy does not mean that labor's exemption from the antitrust laws automatically applies. As pointed out, the disparate opinions in *Jewel Tea* make it difficult to draw conclusions as to the concensus of the Court on this issue. Since *Jewel Tea*, the Court has .decided one case in which it considered the problem of legitimate union interest in the context of an antitrust complaint.

In *American Federation of Musicians* v. *Carroll*, 391 U.S. 99 (1968), the Court was presented with a situation in which several orchestra leaders sued the musicians' union alleging that union restrictions on their ability

as independent contractors to deal with third parties seeking their services violated the antitrust laws.

The Supreme Court, in an opinion by Mr. Justice Brennan, held that due to the community of interests and possible inter-competition between the band leaders and union members, the setting of uniform prices by the union and the agreement thereto by the orchestra leaders did not violate the antitrust laws. The question of possible conspiracy with a non-labor group was found not relevant as the Court held that the orchestra leaders were themselves a labor group for the purposes of the Norris-LaGuardia Act. The Court then turned to the question of legitimate union interest with regard to the union's price setting. Pointing out that the crucial determinant was the impact which the price setting had on the union's membership, the majority found the activity protected. The Court indicated that such an agreement was necessary to protect the wages and other legitimate concerns of the union members because undercutting by the independent contractor-orchestra leaders generally led to a "skimping" on the amounts paid the member musicians.

Justice White, joined by Justice Black, dissented in an opinion stressing that the benefit to the union members was to be weighed against the anticompetitive impact of the agreement when evaluating the scope of a legitimate union interest. He felt that the elimination of price competition was too great despite the union's legitimate interest in not having orchestra leaders undercut wages to musicians. It is obvious that one of his major concerns was that, by dictating the price to be charged, the union here eliminated all normal competitive devices available to the independent contractor-orchestra leaders, including those competitive advantages not directly based on wages paid and work standards of union members. In short, the union practice of setting a minimum price floor eliminated from certain leaders the right to use competitive devices to cut the price lower even though such reductions in prices could conceivably have been obtained without corresponding reductions in wages or working conditions of union members.

We now must evaluate the "legitimate union interest" test as it applied to what the plumbers' union was seeking from Connell in this case. At the outset, we note that elimination of that part of competition based on differences in wages and other labor standards has long been recognized the primary objective of any national labor organization. See *Apex Hosiery* v. *Leader*, 310 U.S. 469, 503-04; *Mine Workers* v. *Pennington*, 381 U.S. 657, 666 (1965); *American Federation of Musicians v. Carroll*, 391 U.S. 99, 106. Such a conclusion, of course, flows from the very nature and history of the organized labor movement. All labor unions tend to limit competition to the extent that they raise wages and labor standards forcing employers to either raise prices to cover the costs of increased standards or to use other competitive devices which are not directly tied to wages or conditions of work. All labor unions have a legitimate interest in the elimination of that component of competition which is based on differences in labor standards.

Is the union in this case seeking an agreement involving a legitimate union interest? We feel it clearly is. In the *Pennington* and *Allen-Bradley* cases, the Court did not have to face this question because the allegations sufficiently presented a claim of conspiracy to create a monopoly for non-labor groups. That was not the case, however, in *Jewel Tea* and *American Federation of Musicians* where the conspiracy elements were no longer viable.

The plumbers' union is simply seeking to eliminate competition based on differences in labor standards and wages. Even if the construction unions involved herein were to obtain contracts from every general contractor and subcontractor in the area, so long as there were no allegations of conspiracy to prohibit new entries or to otherwise create a monopoly for the signatory non-labor interests, the antitrust exemption cannot be lost because of the legitimate union interest underlying this agreement. In this regard it is extremely important to realize that the legitimate union interest requirement does not have to be considered until such time as the conspiracy allegations, if any, have been found to be unavailable as a grounds for removing the exemption. Thus, most of the evils which can result from such market closing schemes as were found in *Allen-Bradley* can simply be covered under the conspiracy rubric. Even legitimate union interest cannot serve to exempt a union from antitrust sanctions when in securing that legitimate goal the union agrees to a market allocation or other conspiracy to create an unfair business advantage for the non-labor parties. That is the clear teaching of *Allen-Bradley*

and *Pennington* but, as noted, that is not the situation which Connell presents at this point in time.

The central reason that the union wants the agreement sought in this case is that it will be helpful in organizing other subcontractors. The direct relation of this type agreement to that goal is clear. These agreements tend to eliminate any edge that a non-unionized subcontractor has in bidding on a job when that competitive edge rests solely or primarily on the fact that he pays less wages or grants lower working standards than a unionized subcontractor. Thus, the achievement of a contract such as the one here with Connell gives the union a strong weapon in its quest to unionize other subcontractors.[5]

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[5] At this point the countervailing arguments with respect to freedom of choice of the employees and the argument that non-union contractors provide a legitimate anti-inflationary function by helping hold down wages unions would otherwise demand if they had an entire industry sewed up are, indeed, very difficult questions which have to be faced, but the instant question is whether or not they are to be faced in this suit. These policy concerns are of a type dissimilar to the rationale underlying antitrust policy. These arguments are far more germane to labor law issues. Assuming, as we must, that Congress truly meant to approve elimination of that competition based on differences in labor standards and wages and insulate such a result rom antitrust attack absent a conspiracy to monopolize, it becomes clear that other public policies, such as freedom of choice, are to be protected in an alternative manner.

As will be discussed *infra*, it seems that Congress has indeed tried to maintain all competing policies which Connell seeks to have apply. In doing so, however, Congress has chosen to act through the specific labor statute, not under the more general antitrust laws.

It is clear in this case that the union is trying to get around an inherent situation which has long been recognized as making the construction industry unique in the field of labor relations. The core of this problem stems from the fact that work in the construction industry is ambulatory in nature and that there is a decided lack of continuity between the various parties — owner, general contractor, subcontractor, and employees — who are related to an individual project. The owner, of course, is basically the money source for the job which, by its nature, is obviously intended to be completed in a limited duration of time. The general contractor, with or without employees of his own, is the one who is actually in charge of getting the job done. As a general rule, the general contractor hires subcontractors, usually on the basis of competitive bids, who actually perform that construction which his own employees do not do. These subcontractors are independent businessmen and their relationship to the general contractor is limited to the duration of the job on which they are the successful bidder. The subcontractors have their own employees and in most instances the subcontractors are the immediate employers with whom the union has to deal.

Thus, the union is faced with a fairly difficult problem because of the impact that the isolated general contractor has on the labor relations of the independent subcontractors. A permanent relationship with the subcontractor does not in any way ensure the union of a permanency of available work and thus differs from manufacturing where there is far more continuity be-

tween the parties dealing with the union and the ones in control.

It can be readily seen that construction unions have a direct interest in seeing that general contractors hire subs using union labor much as it is obvious that the hatters had a strong interest in seeing retailers buy for resale only union-made hats.

In *Jewel Tea*, Justice White's group found that the hours of marketing meat — even pre-cut meat — was a legitimate concern for the butchers' union that allows restriction on use of a competitive device which is obviously only remotely related to a union's primary aim. The agreement the union sought from Connell, however, is directly related to work attainment, work preservation, and other labor standards which directly benefit the members of the union involved. Just as in *Jewel*, the aims of the union in *American Federation of Musicians* were not nearly as related to direct union benefit as are the terms sought from Connell, yet in each of those cases the Supreme Court found that the terms of the agreement sought were sufficiently related to the elimination of competition based on wage and standard differences that the antitrust exemption was available.

Even if the anticompetitive aspects are weighed against the direct benefit as Justice White suggests they should be in his *Jewel Tea* opinion and *American Federation of Musicians* dissent, it would be difficult to find these goals illegitimate. First, it is clear that in section 8(e) Congress explicitly recognized the legi-

timacy of these restrictions on subcontractors wherever the general contractor had unionized employees of his own. The *anticompetitive* effect does not change that much where the general contractor has no employees of his own. Of course, the situation may differ when all general contractors have agreed. However, it still remains that the only anticompetitive aspect is that the unions have succeeded in eliminating that feature of competition based on lower standards or wages. There remain numerous other competitive devices. Furthermore, if the unions set wages so high that marginal and smaller employers are forced out of business the specter of a *Pennington* conspiracy should be sufficient to prevent this result. Finally, Congress always has the option of restriking the balance.

What this all comes down to is the realization that antitrust is not the proper method of handling this problem as it is presented in the complaint.[6]

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[6] In his *Jewel Tea* opinion, Justice Goldberg specifically pointed to the problem facing courts in applying the broad Sherman Act provisions:

> . . . Union restrictions on contracting out and subcontracting of work are delineated by §8(e) of the Act. For the issue presently before us, it is most significant that in enacting this last prohibition, Congress in the exercise of its legislative judgment, specifically excepted the unusual situations existing in the garment and building industries. Such exemptions for particular industries, which may be proper subjects of legislative discretion, would, of course, be most difficult for courts to make in employing a broad proscription like the Sherman Act.

We might add that construing the meaning of such a legislatively-created labor law exception in the context of an *antitrust* action is equally, if not more, difficult.

VII

At this point is seems necessary to consider how the element of legitimate union interest is affected by the form in which the challenged agreement is obtained. In short, does it matter for purposes of the antitrust laws in a case where no conspiracy to monopolize is alleged that the agreement entered into or the method that agreement was achieved may possibly be an unfair labor practice? We think not.

It is not clear here whether or not the contract involved in this case is protected by the labor laws, prohibited by the labor laws, or in some way not spoken directly to by Congress in the labor laws. The union argues that this contract is expressly protected by section 8(e) of the National Labor Relations Act. The company maintains that Congress never intended that provision to reach the precise situation presented by this case. Detailed study of relevant Board and court opinions fails to illuminate any cases in point. There are several cases which imply a resolution one way or the other but these are somewhat conflicting. We can say with some assurance that the Board has not clearly ever ruled on this precise situation. We do not have to face the question of whether or not this activity is prohibited, protected, or not reached by the labor laws if that issue is immaterial to an antitrust suit.

Consideration of the options open to the court following determination of whether this is an unfair labor practice or outside the statute illustrate that such a course is perilous when antitrust sanctions are involv-

ed. If we were to determine that this activity was protected there would, of course, be no cause of action in antitrust. However, we would have usurped a Board prerogative for unfair labor practices are to be considered in the first instance by the expert administrative body established by Congress.

If we decided that the activity was indeed an unfair labor practice, in addition to usurping Board prerogative, we would be faced with the difficult question of fashioning a remedy. We have no jurisdiction to grant remedies under the labor statute, especially in a suit under antitrust laws. Yet Congress has specifically taken cognizance of agreements such as this in the labor laws and has provided a set of sanctions to be applied for violation of those rules. In short, if we find this activity an unfair labor practice we will be deciding that Congress has directly addressed this question and decided how the balance of interest between labor and management is to be struck in the public interest. But no where has Congress ever said that a violation of the labor laws should give rise to treble antitrust damages, possible criminal punishments, and attorney's fees for the plaintiffs. Yet, allowing this suit to continue as an antitrust action merely because a violation of the labor laws was found would involve those punishments.

We note that in *Apex Hosiery* v. *Leader*, *supra*, the Supreme Court refused to allow an action in antitrust even though the union in that case used violent and illegal means to achieve its goal of the then permitted union shop. The Court indicated that the method of

achieving the ultimate goal, no matter how disruptive of commerce or how violative of public order, could serve to give federal jurisdiction where the agreement or ultimate goal of the union was lawful.

The following language from a dissenting opinion by Justice Stewart, joined by Justices Black, Douglas and Clark, in *Woodwork Manufacturers Association* v. *N.L.R.B.*, 386 U.S. 612 (1967), supports the conclusion that legitimate union interest is not controlled by legality of the activity under the labor laws:

> Legitimate union objectives may not be accomplished through means proscribed by the statute. *Id.* at 651.

This statement obviously illustrates what the true relationship between the union's legitimate aims and the labor laws is. In essence, it states that Congress in the labor laws was striking a balance between the public interest and the achievement of the goals of organized labor. Some weapons it found too powerful to leave in the hands of labor in seeking to achieve uniformity of wages and standards. Outlawing the means in no way outlawed the goal. Therefore, it cannot be said that the commission of an unfair labor action in this case, if one has indeed been committed, violates the antitrust laws.

Even if our construction of the statute and congressional intent were to indicate that this activity fell without the statute completely[7], there would still be a very

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[7]Our consideration of the precise sections of the National Labor Relations Act leads us to the conclusion that this activity, if not expressly protected by the statute, is conclusively prohibited. This is discussed in Section VIII, *infra*.

difficult question of whether or not antitrust remedy was available. As we have noted, there is no allegation of conspiracy here nor is there any real showing that the union does not have a purely legitimate interest in obtaining this contract which would directly benefit its members. There are some things which Congress has left to sheer economic power in the labor-management area. If this case, framed as it is without the usual antitrust allegations, were to be allowed there would be a chance that the courts were trampling on an area left intentionally unregulated by Congress. Furthermore, a general policy of regulating such activities might spill over into areas where it was relatively clear Congress had intended raw economic power to govern.

The above analysis amply illustrates that for antitrust purposes the term "legitimate union interest" is not controlled by whether or not the goal sought or the methods used in attempting to reach that goal violate the ground rules for labor relations set forth in the NLRA. If and when those ground rules are violated, punishment must come through the procedures and in the manner specified by Congress in the labor laws. Absent a viable conspiracy allegation, a union retains its exemption from antitrust attack so long as the terms of the agreement it seeks are designed to benefit its members in the hours, conditions, and other immediately relevant concerns of the working man.

The union here is seeking a weapon in its battle to eliminate competition based on differences in wage and labor standards. It might be argued here that this agreement with Connell goes further because it restricts agreements to unionized subcontractors, not just to those who pay union wage scale. However, this would be true in all cases of union activity because the primary way to eliminate these differences is through unionization of all the employees in a particular industry. Furthermore, unionization of all the employees in an industry has itself always been recognized as a proper goal of labor organizations.

It has long been established that labor unions have a clear right to approach and, in some ways, "persuade" consumers and other third parties from using or dealing in non-union-made goods, despite the fact that these actions restrict full and free competition. In *Cedar Crest Hats*, the agreement between the merchant and the union that the merchant would no longer sell non-union hats is a restriction on that merchant's freedom to deal with some manufacturers. The only element in that case subject to antitrust attack is the agreement not to deal. Here, Connell stands in the same position as that hat manufacturer. He has been "convinced" to agree not to deal with certain subcontractors. From the point of view of the affect of such an agreement on competition, the restrictions on his right to do business as he desires are the same no matter what his reasons for making such an agreement are. If Connell and another general contractor agree not to use a certain sub to drive him out of business, the anticompetitive effects of the agreement are obviously just as if the hat merchant had entered an

agreement with other merchants to boycott a certain manufacturer because of some trade practice.

This court, in *Cedar Crest*, held conclusively that there was no antitrust action there. From the standpoint of restriction on competition there is no difference between *Cedar Crest* and Connell. Both the agreements are anticompetitive to a certain extent. Why, then, can there not be attack? The simple answer is that absent allegations of conspiracy to create a monopoly for some business interest, the competing policy favoring unionization insulates the agreement. The reason the agreement is insulated stems from the fact that the union is acting only in its self-interest in pursuit of a goal long recognized as basic to every labor organization. The unions in *Cedar Crest* had no lasting relationship with the hat merchant; they did not and could not represent any employee of his. Yet they were seeking to unionize hat manufacturers with whom he dealt and in furtherance of that objective they elicited a promise from the merchant to boycott those with whom they had a dispute. The unions in Connell have done no more or not less from the point of view of impact on the competitive market.

There are only two possible differences between *Cedar Crest* and Connell. First, there was a written contract in Connell, not just an agreement, but anyone familiar with antitrust law will recognize that an antitrust violation can certainly occur where there is no more than a understanding among the parties. Secondly, the agreement in *Cedar Crest* was obtained without violation of the labor laws, but, as we have shown above, the legality of the method of securing

the agreement under the antitrust laws is germane to the antitrust aspects.

Therefore, we are convinced that the complaint before the district court in this case was insufficient to avoid application of the union's exemption from general antitrust attack.

VIII

At this point it has become patently obvious that this is a labor law, not an antitrust, controversy. Our in depth consideration of the National Labor Relations Act in connection with this case has satisfied this court that Congress has spoken directly to the activities of this union in this case in that statute. Under the allegations of Connell's complaint, if the union's conduct is not expressly protected in section 8(e) of the Act, then it is expressly prohibited by that section or other sections of the Act. We see no conceivable way that this coercion to sign this agreement can escape provisions of the labor laws.

Section 8(e) of the National Labor Relations Act[8]

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[8](e) It shall be an unfair labor practice for any labor organization and any employer to enter into any contract or agreement, express or implied, whereby such employer ceases or refrains or agrees to cease or refrain from handling, using, selling, transporting or otherwise dealing in any of the products of any other employer, or to cease doing business with any other person, and any contract or agreement entered into heretofore or hereafter containing such an agreement shall be to such extent unenforcible and void: Provided, That nothing in this subsection (e) shall apply to an agreement between a labor organization and an employer in the construction industry relating to the contracting or subcon-

prohibits what are popularly known as "hot cargo" clauses. These clauses were used by unions, prior to the amendments banning their use in 1959, as a form of secondary pressure against those with whom the union had a dispute. It enabled the union to seriously damage an employer's business by forcing others who dealt with that employer on a regular basis to cease doing business with him.

In 1959, Congress determined that this was simply too powerful a weapon and too subject to abuse for it to be allowed. In banning these hot cargo clauses, however, Congress left exceptions to the ban for two industries — construction and garment. The construction exception was limited to work to be performed at the job site.

The classic hot cargo agreement was merely a clause in an otherwise valid collective bargaining contract between an employer and the union which represented his employees. It generally stated that the employer would not deal with any product of another employer with whom the union had a dispute. In a manner of speaking, it was philosophically justifiable to have such a clause in order to prevent the members of a union from having to handle, distribute or otherwise deal with the goods of an employer with whom their union was having a dispute and against whom their union was applying economic pressures. As noted, Congress rejected this argument and banned these

tracting of work to be done at the site of the construction, alteration, painting, or repair of a building, structure, or other work.

clauses, except for the garment and construction industries.

Plaintiff Connell is clearly engaged in the construction industry, and at first blush it would appear that the union activity in this case is protected by the section 8(e) proviso. In arguing for the non-applicability of the proviso, however, Connell has stressed that the agreement sought by the union is not a classic hot cargo clause because there exists no bargaining relationship between this union and Connell. In short, Connell argues that the proviso is inapplicable, construing the term "any employer" to mean only the immediate employer of the employees represented by the union. The construction placed on that term, which must be derived from an intimate knowledge of labor relations in the construction industry and full awareness of congressional goals in the 1959 amendments, will be dispositive of the legality of the union's conduct.

If it is determined that "any employer" includes one in the position of Connell, the activity is protected. If that term is held to *not* reach Connell, at first glance it would appear that Congress has left the conduct unregulated in the labor laws.[9] However, there is another section of the Act which would apply to govern the union's conduct.

[9] If the word "employer" is read to exclude Connell in the proviso, then it seems that the word "employer" in the general ban of section 8(e) would have to be read in the same manner, thus, leaving this activity totally unregulated by this section of the statute.

Section (b)(4)(ii)(B) makes it an unfair labor practice to:

> threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where ... an object thereof is forcing or requiring *any person* ... to cease doing business with any other person. (Emphasis supplied).

It should be noted at the outset that this section applies to "any person" and is not restricted only to employers. The union picketing in this case would clearly come within at least the term "coerce". It may be enough that the contract "restrains" Connell to make its continued existence a violation of this section. Furthermore, it is certainly clear that the contract requires Connell to cease doing business with other persons. Unless the union can fit itself within 8(e), it would seem unquestionable that the union is committing an unfair labor practice under this section.

The leading case on the interpretation of section 8(b)(4), *N.L.R.B.* v. *Servette, Inc.*, 377 U.S. 46 (1964), is valuable in illuminating the delicate differences which Congress has sought to recognize while broadly legislating against secondary activity. The delivery drivers' union was engaged in a strike against *Servette*, a wholesale distributor. To bring additional pressure on *Servette*, union representatives asked the managers of food chains to cease handling products distributed by *Servette*. These "requests" were generally presented with warnings that failure to agree would result in publicity leafleting in front of the markets.

The NLRB dismissed unfair labor practice charges and the Supreme Court affirmed. It is interesting to note that the union's conduct in *Cedar Crest Hats* parallels the conduct in *Servette*.

In finding this activity protected, the Supreme Court noted that section 8(b)(4)(i) banned even inducement or encouragement of any individual employer by another seeking that such individual refuse to handle the goods of another employer. It held that the managers were only being encouraged to use managerial discretion and were not being encouraged to refuse to do their jobs. Pointing out that the 1959 amendments were designed to close various loopholes in the earlier bans against secondary boycotts, the Court stated:

> Moreover, the division of § 8(b)(4) into subsections (i) and (ii) by the 1959 amendments has direct relevance to the issues presented by this case. It had been held that § 8(b)(4)(A) did not reach threats of labor trouble made to the secondary employer himself. Congress decided that such conduct should be made unlawful, but only when it amounted to conduct which "threaten[s], coerce[s] or restrain[s] any person"; hence the addition of subsection (ii). The careful creation of separate standards differentiating the treatment of appeals to the employees of the secondary employer not to perform their employment services, from appeals for other ends which are attended by threats, coercion or restraint, argues conclusively against the interpretation of subsection (i) as reaching the Local's appeals to the

> supermarket managers in this case. If subsection (i), in addition to prohibiting inducement of employees to withhold employment services, also reaches an appeal that the managers exercise their delegated authority by making a business judgment to cease dealing with the primary employer, subsection (ii) would be almost superfluous. *Harmony between (i) and (ii) is best achieved by construing subsection (i) to prohibit inducement of the managers to withhold their services from their employer, and subsection (ii) to condemn an attempt to induce the exercise of discretion only if the inducement would "threaten, coerce, or restrain" that exercise.* (Emphasis added and footnotes omitted). 377 U.S. at 53-54.

We see no way that if Connell cannot be termed an employer within 8(e) the union can escape the application of this subsection because without the protection of 8(e) the union's activities become a classic example of secondary activity. As we have previously pointed out, we do not have original jurisdiction to determine unfair labor practices. That rests with the labor board. We are convinced that it is the labor board which must decide this issue. Having illustrated that antitrust is not the proper vehicle for this case as it is currently alleged, and having shown that this activity is undoubtedly either prohibited or protected by the labor laws in quite specific provisions, it becomes obvious that the Board has exclusive jurisdiction to decide in the

first instance what Congress meant in 8(e) and 8(b)(4).[10]

Connell points to the *K.A.S.* case referred to earlier, in which the General Counsel refused to issue a complaint against picketing to obtain an agreement such as this, as an example that the Board is refusing to hear such complaints. First, Connell has never attempted to take its specific situation to the Board and it has never been turned down by the General Counsel. We do not have the full facts of *K.A.S.* before us. Even if the Board refused to take *K.A.S.* or a similar charge brought by Connell, we are not convinced that this should give rise to an antitrust action.

Because of the continuing nature of the restraint involved, we feel that Connell might be within the time provision for filing charges under the National Labor Relations Act. At least it could certainly try. Even if the Board refused to consider the charges in a way that Connell could ultimately seek and obtain court review, there appears an available method for securing court determination on the legality of this contract without the necessity of allowing it to be brought as an antitrust suit to get such review. The option is always open to Connell to violate the provisions of this

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[10] Since we have determined that there is no antitrust cause of action in this case as it is alleged, we do not find it necessary to pass on whether or not Congress, by the 1947 and 1959 amendments to the NLRA, intended to automatically preclude antitrust attacks for secondary boycotts even when a more traditional *Allen-Bradley* conspiracy is alleged. In this regard see the opinion of Justice Goldberg in *Jewel Tea*, 381 U.S. 708, n. 9, and the comments of Justice Stewart in his dissent in *National Woodwork Manufacturers*, 386 U.S. 652, et seq.

contract which it feels are not protected by the labor statutes. It is well-settled that while a union in the construction industry may strike to obtain such a contract clause, once that clause is violated a union may not strike to enforce it. The union's only available remedy is a suit under section 301 for damages. See, e.g., *Local 48, Sheet Metal Workers* v. *Hardy Corporation*, 5 Cir. 1964, 332 F.2d 682. Connell could raise in defense its claims that the contract itself or the manner in which it was achieved violate labor law and policy. This, of course, risks some penalty as the result of an adverse legal finding. However, this alone is not sufficient to create an action in antitrust as a vehicle for testing the statute.

The union has argued that precedent conclusively establishes that this activity was undeniably protected by the NLRA. Our detailed study of Board and court opinions leaves us with the feeling that this precise issue relating to the meaning and interpretation of section 8(e) has never been given a full and complete treatment by either the Board or a court. We are not unmindful of the Board's adoption of the Administrative Law Judge's decision in *Los Angeles Building and Construction Trades Council (Church's Fried Chicken, Inc.)*, 183 N.L.R.B. 102. However, we do not feel that that rather enigmatic opinion is sufficient to be dispositive of the issues raised in this case. We feel quite strongly that the Board should take and consider this issue fully at the next available opportunity. Its resolution will have significant impact on labor relations in the construction industry. Repeated attempts by an administrative body to avoid resolution of a difficult issue may constitute an abuse of discretion. See *Tem-*

pleton v. *Dixie Color Printing Co.*, 5 Cir. 1971, 444 F.2d 1064.

Thus, we have concluded that on the basis of the allegations presented in this suit, there is no cause of action for Connell in antitrust. As our opinion illustrates, we do not feel we have jurisdiction to directly decide the complex labor issues underlying this dispute. We feel that if Connell desires adjudication of these matters there are adequate methods for securing such a determination without resorting to a possible warping of the antitrust laws.

IX

Having disposed of any claim under the federal antitrust statutes, we turn to consideration of the sole remaining issue — the possibility of recovery under state antitrust laws. After careful consideration, we hold that state antitrust laws cannot be applied to this activity because of preemption by federal law. We note here that Connell has argued that the federal antitrust statutes do not necessarily preempt application of state antitrust statutes. However, it is not the federal statutes pertaining to antitrust which we feel are controlling here. Rather, as we have previously pointed out, the dispute in this case is unquestionably a labor law issue. It is the body of federal labor law, primarily enunciated in the National Labor Relations Act, which we feel preempts the possible application of state antitrust remedies to this situation.

As noted, the activity under challenge in this case is almost certainly either protected or prohibited by

the Act. The reason that can be said is that there is a strong argument either way: that is, a strong case can be made for the position that this language in the National Labor Relations Act prohibits the union from obtaining contracts of the type challenged herein in this manner and also there is a strong argument for the proposition that the National Labor Relations Act specifically sanctions and protects such contracts. Having cast the controversy squarely within the realm of labor law, the state is not free to apply its own antitrust laws to activities so intimately intertwined with federal labor law and policy.

The rule is generally stated that whenever certain activity is either arguably protected or arguably prohibited by the National Labor Relations Act, only the National Labor Relations Board may make the initial determination whether the activity is protected, prohibited, or in the gap left without regulation by federal law. This rule was initially set forth in *San Diego Building Trades Council* v. *Garmon*, 357 U.S. 925 (1958), and has been recently reaffirmed. *Amalgamated Association of Street, Electric Railway & Motor Coach Employees of America* v. *Lockridge*, 403 U.S. 274 (1971). Despite many criticisms, including those voiced by the dissenters in *Lockridge, supra*, we feel that *Garmon* is still the law of the land on this issue. Thus, since it is obvious here that the activity in this case is in all probability either protected or prohibited by the National Labor Relations Act, we feel these decisions clearly establish that state antitrust laws cannot be applied to this situation.

For the reasons set forth in this opinion, we hold that the appellant has failed to remove this union's immunity from antitrust attack in this case. Therefore, the judgment of the district court, albeit on different grounds, is

AFFIRMED.

CLARK, Circuit Judge, dissenting:

While I expressly agree with what is implicit in the majority opinion — that the issues in this case are novel and important — with deference I cannot agree that a labor organization enjoys a virtually total immunity from federal antitrust jurisdiction. Where, as here, a union local's activity not only constitutes a congressionally defined unfair labor practice — secondary boycott[1] — but also forces a business engaged in commerce to contract that it will refuse to deal with other firms whose employees are not controlled by the local, I find no bar to judicial relief. The end does not justify the means. The mere fact that the local desires to efficiently spread its organization of plumbing workers cannot legitimitize practices which cut across the business rights of neutral companies, the choice-of-representation rights of employees,[2] and the rights of other union groups who may wish to organize employer companies in this craft. Remitting the plaintiff here to an administrative remedy which has already been tried

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[1] 29 U.S.C. §158, particularly sub-sections (b)(4)(ii), (b)(7)(C) and (e).

[2] 29 U.S.C. § 159.

without success is unrealistic and remitting him to the partial remedy of an express statutory right to sue in damages[3] is incongruous.

I would begin my reasoning by emphasizing that Plumbers Local 100 did not seek to force Connell, the object of its economic coercion, to employ union labor — either members of Local 100 or members of any other labor organizations. It had no present or future interest in any employee of Connell. Rather, through the use of picketing which effectively halted all of Connell's general contract work, Local 100 forced Connell to agree to withhold all mechanical subcontract work from subcontractors who did not have a collective bargaining agreement with Local 100. Through this indirect expedient, the union sought to extend its bargaining power to cover the employees of every plumbing construction firm in the market area in which Connell worked. This classic secondary boycott and the resulting work stoppage, relatively costless to the union in time, manpower, finances or side effects, but completely devastating to the general contractor, could have had only one result — Connell's capitulation and execution, under protest, of an agreement to refuse to do business with any subcontracting firm which did not employ members of this one local. Since no general contractor could withstand the pressure of having his entire work picketed, the meaning to everyone in the plumbing trade is clear — get in Plumbers Local 100 or get out of business. This scheme has separate but equally proscribed labor policy and antitrust effects. From the labor standpoint it deprives plumbing workers of the right to ballot for their bargaining repre-

[3] 29 U.S.C. § 187.

sentative, destroys interunion rivalry for representation rights, and embroils neutral employers in disputes in which they have no real interest. From the antitrust viewpoint, it clearly restrains trade by requiring general contractors to boycott plumbing contractors with whom Local 100 has been either unwilling or unable to secure a collective agreement.

Two distinct positions are advanced in support of the union's claim that its conduct, no matter how violative of the antitrust law, is immune from antitrust sanction: First, that its actions are protected by the provisions of the National Labor Relations Act — in particular the "construction proviso" to Section 8(e) of that Act; and second, that even if the secondary picketing and resulting agreement are not exempted by Section 8(e), it does not matter since labor organizations enjoy relatively complete immunity from antitrust regulation. My brothers pretermit consideration of the first and most strenuously urged defense — the NLRA's sanction of secondary boycott action at construction sites — and predicate their opinion solely on the second defense — that the union activities here, legal or illegal, are immune from Sherman Act sanctions. With deference, I disagree, not just as to the method of decision, but as to result. Since in my view there is no *carte blanc* immunity, I must deal with the construction of 8(e) and I would hold that the unions defense urged there is not well taken.

General Antitrust Immunity — The rule which I discern from the existing authorities is two-fold. First, in spite of the general antitrust immunity with which

Congress[4] and the courts[5] have sheltered the labor movement, union conduct, even where lawful under the labor statutes, may violate antitrust provisions if the union either combines with nonlabor groups or pursues nonlabor goals. The majority agrees with this. Second, union conduct which violates the labor laws may fall without the general antitrust immunity conferred by those laws if it is determined that the action which is labor law illegal also violates the antitrust laws.[6]

There are two principal bases in law as well as solid logic to support this conclusion. The post *Apex Hosiery-Hutcheson* legal developments are congressional action in adopting the Landrum-Griffin amendments in 1959 to the National Labor Relations Act and the Supreme Court's decision in *Local 189, Amalgamated Meat Cutters v. Jewel Tea Co.*, 381 U.S. 676, 85 S.Ct. 1596, 14 L.Ed.2d 640 (1965). It comports with my sense of reason that anyone who mandates that another engage in restraint of trade by engaging in a labor practice condemned by Congress ought to be antitrust accountable.

[4]Sections 6 and 20 of the Clayton Act (15 U.S.C. §17, 29 U.S.C. §52) and Section 4 of the Norris-LaGuardia Act (29 U.S.C. §104).

[5]Apex Hosiery Co. v. Leader, 310 U.S. 469, 60 S.Ct. 982, 84 L.Ed. 1311 (1940); United States v. Hutcheson, 312 U.S. 219, 61 S.Ct. 463, 85 L.Ed. 788 (1941).

[6]Cedar Crest Hats, Inc. v. United Hatters, 362 F.2d 322 (5th Cir. 1966), is not to the contrary. There this court stated:

> [I]n order for union activity to constitute a violation of antitrust laws *in the circumstances here presented*, there must be a combination of union and nonunion business groups to create a monopoly, resulting in a restraint of trade or interstate commerce.

362 F.2d at 326 (emphasis added) (footnote omitted). In *Cedar Crest Hats* the court specifically found that the union activity was protected by the labor acts. Thus that case did not purport to consider antitrust immunity in the context of an unfair labor practice such as is present in Connell's case.

I appreciate that the majority does not agree with my view of the manner in which the existing precedents should be construed and applied. However, if any common principle can be drawn from the *Jewel Tea* decision (looking both at views of Mr. Justice White, on one hand, and those of Mr. Justice Goldberg on the other) it is that at least some unilateral union activity, though described by the broad language of the Clayton and Norris-LaGuardia Acts, is without the scope of the labor antitrust exemption. Mr. Justice White expressed the view that union-imposed restrictions on the operating hours of employers would be immune to antitrust attack only if those provisions were so intimately related to traditional areas of labor concern, such as wages, hours and working conditions as to fall within the protection of the national labor policy. Mr. Justice Goldberg enunciated a broader exemption, extending to all mandatory bargaining subjects. Thus, no matter whose blend of *Jewel Tea* is thought to be more palatable, the court there confirms that some behavior declared legitimate by the earlier Clayton and Norris-LaGuardia Acts but proscribed by the National Labor Relations Act as subsequently amended falls without the antitrust exemption.[7] Since

[7]Arguably Mr. Justice White might even condemn some contractual provisions which were mandatory bargaining subjects if such provisions had only a remote and indirect effect on wages, hours, and working conditions. See Justice White's opinion at 381 U.S. at 689-690, 85 S.Ct. at 1602; and Justice Goldberg's concurrence, 381 U.S. at 727, 85 S.Ct. at 1623. *Compare* Teamsters Local No. 24 v. Oliver, 358 U.S. 283, 79 S.Ct. 297, 3 L.Ed.2d 312 (1959).

even Justice Goldberg's broader opinion provides the basis for holding the local's activities not insulated from antitrust scrutiny, I premise my dissent on his opinion, noting that Justice White's opinion supports my position, *a fortiori*.*

Justice Goldberg begins by updating *Hutcheson*, stating that:

> [T]he labor exemption from the antitrust laws derives from a synthesis of all pertinent congressional legislation — the nature of the Sherman Act itself, §§ 6 and 20 of the Clayton Act, the Norris-LaGuardia Act, the Fair Labor Standards Act, the Walsh-Healy and Davis-Bacon Acts, and the Wagner Act with its Taft-Hartley and Landrum-Griffin amendments.

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*As Judge Morgan points out, six judges in *Jewel Tea* held that there was no sustainable allegation of conspiracy with non-labor groups. The other three judges, spokesmaned by Mr. Justice Douglas, would have found the requisite conspiracy in the collective bargaining agreement signed by the employers. Under that analysis this case too would involve a conspiracy if employers other than Connell had also agreed to boycott non-Local 100 subcontractors, since the contractors could not have agreed among themselves to boycott certain subcontractors any more than they could have agreed to fix prices or allocate markets. Thus the Douglas opinion in *Jewel Tea* would also find the agreement here within the scope of the Sherman Act if, as seems likely, other employers had also agreed to the boycott. Apparently Justice Douglas's opinion is predicated on the view that the union concern is marketing hours was not "immediate and direct;" there is no indication as to whether such concern is co-extensive with mandatory bargaining subjects.

381 U.S. at 709, 85 S.Ct. at 1614 (footnotes omitted). This language evinces a clear recognition that the scope of antitrust immunity, which was once co-existent with the parameters of the Clayton and Norris-LaGuardia Acts, must be reexamined in the light of more recent congressional action. Moving from premise to decision and applying a mandatory/nonmandatory dichotomy, Justice Goldberg opined that the unfair labor practice of insisting upon a nonmandatory subject could in at least some cases constitute an antitrust violation.

The analogy between Justice Goldberg's paradigm of a loss of antitrust immunity and the case at bar is imperfect, since Justice Goldberg predicated his reasoning on union insistence on a nonmandatory bargaining subject within an established bargaining relationship, while here Connell and the union had no labor law duty to bargain at all. This lack of symmetry, however, strengthens my view that the union conduct is not antitrust immune. If a union would violate the rule set out by Justice Goldberg by insisting on one nonmandatory term in the course of engaging in labor law required bargaining, surely this local violated the same principle by insisting on the "Local 100 subcontractors only" contract when Connell had no duty to bargain whatsoever.

The principle that I draw from Justice Goldberg's opinion is that the union antitrust exemption dissipates if the union engages in an unfair labor practice and if the union activity is "at the core of the type of anti-competitive commercial restraint at which the antitrust laws are directed." 381 U.S. at 733, 85 S.Ct. at

1626. Justice Goldberg focuses on, but does not limit his opinion to, the most frequently litigated antitrust results of union activities, price-fixing or market allocation. The case before us presents another classic antitrust problem — a concerted boycott of certain other businesses. Clearly, such behavior is also at the core of the behavior proscribed by the antitrust laws.[9]

Guided by my own reason, the change of statutory law, and the authority of both factions of the *Jewel Tea* majority, I would conclude that no absolute antitrust immunity necessarily extends to union activities which are forbidden by the statutes regulating labor-management relations. There is no justifiable reason to reflexively afford an antitrust exemption to conduct which Congress has expressly forbidden to labor organizations.[10] The secondary boycott prohibitions of the Labor-Management Relations Act, as amended by Labor-Management Reporting and Disclosure Act,

[9] *See, e.g.*, Klor's, Inc. v. Broadway-Hale Stores, Inc., 359 U.S. 207, 79 S.Ct. 705, 3 L.Ed.2d 741 (1959); Fashion Originators' Guild of America v. FTC, 312 U.S. 457, 61 S.Ct. 703, 85 L.Ed. 949 (1941); Eastern States Retail Lumber Dealers' Ass'n v. United States, 234 U.S. 600, 34 S.Ct. 951, 58 L.Ed. 1490 (1914).

[10] Not all union misconduct constituting an unfair labor practice should entail a loss of union antitrust exemption; only that conduct which violates the congressionally-protected commercial rights of neutral parties would normally fall without the exemption. It is neither necessary nor appropriate for this dissent to attempt a complete catalogue of that labor law illegal conduct which falls without the exemption. Suffice it to say that since Section 8(e) is designed and intended to protect neutral parties from concerted boycotts required by union activity, a violation of that provision under circumstances similar to those here will place a union beyond the scope of the exemption.

were intended to prevent such a use of economic power directed towards neutral parties. When a union seeks to organize those who work for an employer or group of employers there can be no doubt that Congress has granted it freedom from antitrust proscription to act in concert against such employers in order to bring such employees as may be affected into a unified group of sufficient size to allow the union to deal on a par with management. Congress' balance of the competing interests, as I divine legislative intent, is calculated to produce union peer status, but not union dominance. Therefore, I would hold that where a union bypasses the congressionally sanctioned methods of organizing the employer whose employees it seeks to unite (here, the individual subcontractors) and illegally brings pressure on a neutral, secondary source of work for all such employers within an area (Connell) to force that unrelated economic entity to execute a contract which requires that all directly involved subcontractors bring their work forces into the membership of this local or starve for lack of work, then that union has passed beyond the scope of antitrust immunity.[11] It is incidental to the antitrust problem but cogent to the intent of labor policy that this creates an aggregation of power which not only exceeds any legitimate bargaining objective of a labor organization, but also

[11] The rule which I would follow may bear a superficial resemblance to Duplex Printing Press Co. v. Deering, 254 U.S. 443, 41 S.Ct. 172, 65 L.Ed. 349 (1921), which *Apex Hosiery* declared to have been effectively overruled by the enactment of the Norris-LaGuardia Act. The critical distinction, however, is that the reasoning I favor draws its sustenance from the express declaration by Congress that secondary picketing is not a legitimate union tool, except it is expressly permitted.

carries the seed for internal destruction of the labor movement by creating super locals able to gobble up such contract opportunities to the exclusion of all others.

Moving completely out of the construction industry context so that my example will not depend upon any interpretation or application of the construction proviso, I would first give the following as an illustration of the restraint-of-trade potential of such activities which the majority declares to be immune from antitrust remedies. Suppose a Detroit-based local of the Teamsters Union was determined to control the employees of all of the truck lines hauling automobiles, could they engage free of any antitrust sanction in clearly illegal secondary picketing of the Big Three automakers and their component suppliers to secure a contract requiring the manufacturers to boycott all trucking companies not represented by the local? Or second, in terms of the case before us, could Local 100 go one step further and picket the manufacturing plants of any companies in its area who might intend to construct additional plants anywhere in the United States in order to force these Texas manufacturers to cease doing business with plumbing firms not organized by Local 100 and to cease doing business with contractors who deal with such firms?

In the absence of clear precedent I would not embrace the proposition that patently illegal union activity must somehow be protected from antitrust proscription. Rather, I would hold that whenever a union crosses the line separating protected activities from

prohibited activities it sheds its cloak of total antitrust immunity. Thus, I must reach the question the majority pretermits — the legality of the secondary activity.

Labor Board Preemption — The parties agree that the local's secondary economic coercion here, unless protected by the construction proviso of Section 8(e), is prohibited by Section 8(b)(4). While conceding that in the usual case the National Labor Relations Board should ordinarily be given the opportunity to make the first interpretation as to whether union conduct constitutes an unfair labor practice, I cannot accept the majority's proposition that a federal district court is absolutely barred from deciding the issue.

Of course, the Board has the power and authority to seek an injunction of union actions such as secondary picketing which constitutes an unfair labor practice. That the Board may do so, however, does not mean that the primary jurisdiction of the Board ousts completely the power of federal courts to adjudicate violations of antitrust laws committed to their jurisdiction because such violations also happen to be unfair labor practices.

Congressional policy certainly requires no such deference in all labor cases. For example, had this same case been brought as an action for damages under 29 U.S.C. §187 (Section 303 of the Labor Management Relations Act), a specific grant of jurisdiction would require the same court to make the same determination that today is held to be forbidden.

Moreover, abatement of judicial proceedings pending Board action would be a futile gesture of comity in this case. As Judge Morgan points out, the Board has apparently once resolved the Section 8(e) question adversely to the appellant's position. That determination was not reviewed by any circuit court. In a case almost identical to the one presented here (referred to by Judge Morgan as the K.A.S. case), the General Counsel refused to issue an unfair labor practice complaint. The plain meaning of this administrative history is that it did not require great prescience on Connell's part to anticipate that a resort to administrative remedies for this picketing would be ineffectual.

Justice White in *Jewel Tea*, unchallenged by any of the other opinions, clearly indicates that the primary jurisdiction doctrine is not to be woodenly applied to prevent court resolution of such issues in the antitrust context. Justice White relied in part on the fact that the Board's General Counsel, not the Board or a private litigant, will determine whether to issue an unfair labor practice complaint. He also pointed out the futility of requiring resort to "an expensive and merely delaying administrative proceeding when the case must eventually be decided on a controlling legal issue wholly unrelated to determination for the ascertainment of which the proceeding was sent to the agency." 381 U.S. at 686, 85 S.Ct. at 1600. In light of the General Counsel's established reluctance to submit the issue in this case to the Labor Board for resolution, and in view of the serious antitrust questions involved which are surely not within the scope of the Board's expertise, I would hold that this court and the district

court below are not preempted from resolving the labor law problems in this antitrust action.

Scope of the Construction Proviso — Thus, I must reach the question my Brothers leave for another day: Is the union activity permitted by the construction proviso to Section 8(e)? All parties agree that the contract here is a secondary agreement generally prohibited by the main portion of Section 8(e); the only question is whether this contract is excepted from that prohibition by the construction proviso portion of that section. The language of the relevant portion of that subsection, including the construction proviso is as follows:

> It shall be an unfair labor practice for any labor organization and any employer to enter into any contract or agreement, express or implied, whereby such employer ceases or refrains or agrees to cease or refrain from handling, using, selling, transporting or otherwise dealing in any of the products of any other employer, or to cease doing business with any other person, and any contract or agreement entered into heretofore or hereafter containing such an agreement shall be to such extent unenforcible and void: Provided, that nothing in this subsection shall apply to an agreement between a labor organization and an employer in the construction industry relating to the contracting or subcontracting of work to be done at the site of the construction, alteration, paint-

> ing, or repair of a building, structure, or other work ....

On its face it would appear that the proper answer to this novel question of statutory interpretation would turn on whether Connell is to be deemed "an employer in the construction industry." Even assuming, however, that the language unambiguously includes Connell, such a mechanical parsing of the statute ignores the Supreme Court's admonition that such dictionary adjudication cannot obviate the need for judicial inquiry into Congressional purpose:

> It is a "familiar rule, that a thing may be within the letter of the statute and yet not within the statute, because not within its spirit nor within the intention of its makers." ... That principle has particular application in the construction of labor legislation which is "to a marked degree, the result of conflict and compromise between strong contending forces and deeply held views on the role of organized labor in the free economic life of the Nation and the appropriate balance to be struck between the uncontrolled power of management and labor to further their respective interests." ...

National Woodwork Mfrs. Ass'n v. N.L.R.B., 386 U.S. 612, 619, 87 S.Ct. 1250, 1255, 18 L.Ed.2d 357 (1967).

The difference between the traditional "hot cargo" clause entered into as a part of an established bargaining relationship and the one-shot, single-object con-

tract presented here are substantial. First, and perhaps foremost, a general contractor in an established bargaining relationship has some economic power to resist the inclusion of a hot cargo clause in the collective bargaining agreement. Such a contractor can bargain over proposed clauses and possibly avoid their inclusion or require their modification by trading on some other point. Further, a strike in an established bargaining relationship is much more costly to the union than the relatively painless picketing utilized by the local in this case; here, since the local had no real interest in whether work on this project would ever be resumed, it probably could have maintained its pickets indefinitely. One other distinction between the union behavior here and the behavior which has been heretofore permitted under the Section 8(e) proviso is the much greater possibility of rival unions or locals seeking contradictory subcontracting contracts from the neutral general contractor.

What legislative history there is convinces me that Congress never intended to make legitimate hot cargo contracts between totally non-related parties or to condone the use of economic sanctions to compel such agreements. The limited exemption afforded to construction unions by the proviso

> was granted apparently in recognition of problems peculiar to the construction industry, particularly those resulting from sporadic work stoppages occasioned by the traditional refusal of craft unionists to work alongside non-union men on the same project.

Essex County and Vicinty Dist. Council of Carpenters v. NLRB, 332 F.2d 636, 640 (3d Cir. 1964). The Supreme Court in *National Woodwork* cited the *Essex County* decision and stated:

> [t]he construction proviso ... was intended to be a measure designed to allow agreements pertaining to certain secondary activities on the construction site because of the close community of interest there, but to ban secondary-objective agreements concerning nonjobsite work in which respect the construction industry is no different from any other.

386 U.S. at 638-39, 87 S.Ct. at 1265. The *Essex County-National Woodwork* rationale for the proviso — the community of interests at the construction site — will not support its application in the situation presented by the case at bar. Here there were no union laborers refusing to work alongside the non-union plumbers. Such an objection was altogether impossible because the plumbers on this job were members of the union. The only statutorily related dissatisfaction of Local 100 here was the possibility that a firm employing non-union plumbers might work on Connell's next job. This concern of the union plumbers — to extend their influence to other plumbing firms either not then employed or working on other projects — is not one related to the "close community of interests" on the construction site; rather, that concern is one "in which respect the construction industry is no different from any other."

Moreover, the proper interpretation of this proviso is dependent on a recognition that it was a compromise in order to preserve the established pattern of bargaining in the construction industry. *See National Woodwork, supra*, 386 U.S. at 637, 87 S.Ct. at 1265, and the legislative history there cited. This court requested supplemental briefs from all the parties and amici as to the pattern of bargaining practices utilized in the industry prior to the Landrum-Griffin amendments in 1959. In response to this specific inquiry the union was unable to point out any source of information which would show that subcontractor contracts such as the one in this case were even occasionally utilized in the industry prior to 1959, much less so common a practice that we could assume Congress intended to preserve that part of the pattern of collective bargaining in the industry.

In light of the total lack of any evidence to support the proposition that Congress intended to exempt this wide-ranging type of secondary behavior from the general rule, and considering the probable harm of extensive picketing of neutral parties by various, possibly rival, locals for the purpose of securing recognition of bargaining status from virtually all subcontractors in a given area, I feel compelled to reach the conclusion that this conduct is not protected by the proviso.[12]

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[12]No claim based on Section 8(b)(7) is presented here. *Compare* Building Construction Trades Council of Philadelphia, and Samuel E. Long, Inc., 201 NLRB No. 42 (1973).

Adm. Office, U.S. Courts—Scofields' Quality Printers, Inc., N. O., La.

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 72-1243

CONNELL CONSTRUCTION COMPANY, INC.,
Plaintiff-Appellant,

versus

PLUMBERS AND STEAMFITTERS
LOCAL UNION NO. 100, ETC.,
Defendant-Appellee.

Appeal from the United States District Court for the Northern District of Texas

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ON PETITION FOR REHEARING AND PETITION FOR REHEARING EN BANC

(Opinion Aug. 22, 1973, 5 Cir., 1973, ____ F.2d ____).

(November 19, 1973)

Before MORGAN, CLARK and INGRAHAM, Circuit Judges.

PER CURIAM: The Petition for Rehearing is DENIED and no member of this panel nor Judge in

regular active service on the Court having requested that the Court be polled on rehearing en banc, (Rule 35 Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 12) the Petition for Rehearing En Banc is DENIED.

CLARK, Circuit Judge, dissenting:

I dissent from the refusal to grant rehearing for the reasons set forth in my dissent to the panel majority opinion.

Adm. Office, U.S. Courts—Scofields' Quality Printers, Inc., N. O., La.

APPENDIX C

Statutes

SHERMAN ACT

§ 1, 15 U.S.C. § 1:

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal: * * * Every person who shall make any contract or engage in any combination or conspiracy [hereby] declared * * * to be illegal shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding fifty thousand dolars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.

CLAYTON ACT

§ 6, 15 U.S.C. § 17: Antitrust laws not applicable to labor organizations

The labor of a human being is not a commodity or article of commerce. Nothing contained in the antitrust laws shall be construed to forbid the existence and operation of labor, agricultural, or horticultural organizations, instituted for the purposes of mutual help, and not having capital stock or conducted for profit, or to forbid or restrain individual members of such organizations from lawfully carrying out the legitimate objects thereof; nor shall such organizations, or the members thereof, be held or construed to be illegal combinations or conspiracies in restraint of trade, under the antitrust laws.

§ 20, 29 U.S.C. § 52: Statutory restriction of injunctive relief

No restraining order or injunction shall be granted by any court of the United States, or a judge or the judges thereof, in any case between an employer and employees, or between employers and employees, or between employees, or between persons employed and persons seeking employment, involving, or growing out of, a dispute concerning terms or conditions of employment, unless necessary to prevent irreparable injury to property, or to a property right, of the party making the application, for which injury there is no adequate

remedy at law, and such property or property right must be described with particularity in the application, which must be in writing and sworn to by the applicant or by his agent or attorney.

And no such restraining order or injunction shall prohibit any person or persons, whether singly or in concert, from terminating any relation of employment, or from ceasing to perform any work or labor, or from recommending, advising, or persuading others by peaceful means so to do; or from attending at any place where any such person or persons may lawfully be, for the purpose of peacefully obtaining or communicating information, or from peacefully persuading any person to work or to abstain from working; or from ceasing to patronize or to employ any party to such dispute, or from recommending, advising, or persuading others by peaceful and lawful means so to do; or from paying or giving to, or withholding from, any person engaged in such dispute, any strike benefits or other moneys or things of value; or from peaceably assembling in a lawful manner, and for lawful purposes; or from doing any act or thing which might lawfully be done in the absence of such dispute by any party thereto; nor shall any of the acts specified in this paragraph be considered or held to be violations of any law of the United States.

National Labor Relations Act, as amended

§ 7, 29 U.S.C. § 157. Right of employees as to organization, collective bargaining, etc.

Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 158(a)(3) of this title.

§ 8(b), 29 U.S.C. § 158(b) It shall be an unfair labor practice for a labor organization or its agents—

§ 8(b) 4, 29 U.S.C. § 158(b) (4) (i) to engage in, or to induce or encourage any individual employed by any person engaged in commerce or in an industry affecting commerce to engage in, a strike or a refusal in the course of his employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services; or (ii) to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where in either case an object thereof is—

(A) forcing or requiring any employer or self-employed person to join any labor or employer organization or to enter into any agreement which is prohibited by subsection (e) of this section;

(B) forcing or requiring any person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person, or forcing or requiring any other employer to recognize or bargain with a labor organization as the representative of his employees unless such labor organization has been certified as the representative of such employees under the provisions of section 159 of this title: *Provided*, That nothing contained in this clause (B) shall be construed to make unlawful, where not otherwise unlawful, any primary strike or primary picketing;

* * *

§ 8(e), 29 U.S.C. § 158(e) It shall be an unfair labor practice for any labor organization and any employer to enter into any contract or agreement, express or implied, whereby such employer ceases or refrains or agrees to cease or refrain from handling, using, selling, transporting or otherwise dealing in any of the products of any other employer, or to cease doing business with any other person, and any contract or agreement entered into heretofore or hereafter containing such an agreement shall be to such extent unenforcible and void: *Provided*, That nothing in this subsection shall apply to an agreement between a labor organization

and an employer in the construction industry relating to the contracting or subcontracting of work to be done at the site of the construction, alteration, painting, or repair of a building, structure, or other work: *Provided further*, That for the purpose of this subsection and subsection (b) (4) (B) of this section the terms "any employer", "any person engaged in commerce or an industry affecting commerce", and "any person" when used in relation to the terms "any other producer, processor, or manufacturer", "any other employer", or "any other person" shall not include persons in the relation of a jobber, manufacturer, contractor, or subcontractor working on the goods or premises of the jobber or manufacturer or performing parts of an integrated process of production in the apparel and clothing industry: *Provided further*, That nothing in this subchapter shall prohibit the enforcement of any agreement which is within the foregoing exception.

Texas Business and Commerce Code:

§ 15.02 Trust Defined.

(a) In this section, unless the context requires a different definition, "person" does not include municipal corporation. (No source citation.)

(b) A "trust" is a combination of capital, skill, or acts by two or more persons to

(1) restrict, or tend to restrict, trade, commerce, aids to commerce, the preparation of tangible personal property for market or transportation, or the free pursuit of a lawful business; or

(2) fix, maintain, increase, or reduce the price of tangible personal property, the cost of insurance, or the cost of preparing tangible personal property for market or transportation; or

(3) prevent or lessen competition in

(A) the manufacture, transportation, sale or purchase of tangible personal property;

(B) the business of insurance;

(C) aids to commerce; or

(D) preparing tangible personal property for market or transportation; or

(4) affect, control, or establish the price of tangible personal property, or the cost of transportation, insurance, or preparing tangible personal property for market or transportation; or

(5) agree

(A) not to sell, dispose of, transport or prepare tangible personal property for market or transportation, or not to make an insurance contract, at a price below a common standard or figure;

(B) to maintain the price of tangible personal property, the charge for transportation or insurance, or the cost of preparing tangible personal property for market or transportation at a fixed or graded figure;

(C) to affect or maintain the price of tangible personal property or the cost of transportation, insurance, or preparing tangible personal property for market or transportation in order to preclude free competition between or among themselves or others in the sale or transportation of tangible personal property, in the business of transportation or insurance, or in preparing tangible personal property for market or transportation; or

(D) to pool, combine, or unite an interest they have in the sale or purchase of tangible personal property, or in the charge for transportation, insurance, or preparing tangible personal property for market or transportation, so that the price of the tangible personal property, or charge for transportation, insurance, or preparing tangible personal property for

market or transportation might be in any manner affected; or

(6) regulate, fix, or limit the output of tangible personal property, or the amount of insurance undertaken, or the amount of work performed in preparing tangible personal property for market or transportation; or

(7) refrain from engaging in business, or from buying or selling tangible personal property, partially or entirely in this state.

Texas Business and Commerce Code:

§ 15.03 Conspiracy in Restraint of Trade Defined

(a) It is a conspiracy in restraint of trade for

(1) two or more persons engaged in buying or selling tangible personal property to agree not to buy from or sell to another person tangible personal property;

(2) two or more persons to agree to boycott, or threaten not to buy from or sell to, a person because that person buys from or sells to another person;

(3) two or more persons to agree to boycott, or not to deal with the tangible personal property of another person;

§ 15.03 (4) is not quoted.

Texas Business and Commerce Code

§15.04 Monopoly, Trust, and Conspiracy in Restraint of Trade Prohibited; Agreement Violating Prohibition Void.

(a) Every monopoly, trust and conspiracy in restraint of trade, as defined in Sections 15.01, 15.02 and 15.03 of this code, respectively, is illegal and prohibited.

(b) An agreement violating the prohibition against a monopoly, trust, or conspiracy in restraint of trade contained in Subsection (a) of this section is void and unenforceable in law or equity.

APPENDIX D

AGREEMENT

This Agreement entered into this ..... day of ....., 1970, by and between the signatory contractor, hereinafter referred to as Contractor, and Local Union No. 100 of the United Association of Journeymen and Apprentices of the Plumbing and Pipefiitting Industry hereinafter referred to as Union,

WITNESSETH

WHEREAS, the contractor and the union are engaged in the construction industry, and

WHEREAS, the contractor and the union desire to make an agreement applying in the event of subcontracting in accordance with Section 8(e) of the Labor-Management Relations Act;

WHEREAS, it is understood that by this agreement the contractor does not grant, nor does the union seek, recognition, as the collective bargaining representative of any employees of the signatory contractor; and

WHEREAS, it is further understood that the subcontracting limitation provided herein applies only to mechanical work which the contractor does not perform with his own employees but uniformly subcontracts to other firms;

THEREFORE, the contractor and the union mutually agree with respect to work falling within the scope of this agreement that is to be done at the site of construction, alteration, painting or repair of any building, structure, or other works, that is the contractor should contract or subcontract any of the aforesaid work falling within the normal trade jurisdiction of the union, said contractor shall contract or subcontract such work only to firms that are parties to an executed, current collective bargaining agreement with Local Union 100 of the United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry.

.....

Union

.....

Contractor

UNITED ASSOCIATION

of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada

LOCAL UNION 100, CITY Dallas, STATE Texas,
DATE November 25, 1970

Connell Construction Company
10939 Shady Trail
Richardson, Texas 75220

Gentlemen:

This Local is engaged in a continuing effort to improve and protect the wages and work opportunities of those it represents through lawful and legitimate means. In this connection the enclosed contract has been prepared and is tendered to you with the request that you execute and return it to this Local.

The contract was drafted to conform to the provisions of Section 8(e) of the Labor-Management Relations Act. Should you have any doubt as to its legality, please advise us promptly.

We hope that you will see fit to execute the enclosed contract. In the event you decide not to become a party to this agreement we would appreciate your early reply. Should we have not heard from you by Monday, December 7, 1970, we will interpret your silence as a rejection. In the event you should refuse to sign the enclosed contract, it is our intention to employ the lawful means available to us to protest this refusal.

By this proposed contract we do not seek for you to terminate any existing contractual or business relationship, nor do we seek to force or require your firm to recognize or bargain with this organization, and we do not seek to organize your employees. Our sole purpose in proposing the enclosed contract and any efforts that may in the future be made to obtain such contract are those purposes made lawful by Congress in the enactment of Section 8(e) of the Labor-Management Relations Act.

Be assured that all activities by this Local to secure and/or enforce this contract will be in strict compliance with state and federal law. Should you ever have information to the contrary, please advise the undersigned promptly, so that any necessary steps can be taken to insure that there are no violations of the law.

We shall appreciate your consideration of this request.

Sincerely,

(Signed) A. B. "PAT" PATTERSON
A. B. Pat' Patterson
Business Agent
Plumbers & Steamfitters
Local Union No. 100

D-4

January 19, 1971

Mr. Pat Patterson
Business Agent
Plumbers and Steam Fitters Union Local 100
1727 Young Street
Dallas, Texas 75201

Re: Picketing at Bruton Venture Project

Dear Mr. Patterson:

We are surprised that you are picketing our project located at 8700 Stemmons Freeway in an effort to force us to sign an agreement with you stating in effect that we cannot do business with any company that does not have an agreement with your Union. It is somewhat ironical that the very project that you are picketing on has a union mechanical subcontractor. If we should sign the agreement that you are trying to force on us, we would be in violation of the antitrust laws of the State of Texas. Therefore, we request that you withdraw your picket line.

Very truly yours,

CONNELL CONSTRUCTION CO., INC.

Thomas H. Stewart

Supreme Court, U. S.
FILED
MAR 4

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973.

No. 73-1256

CONNELL CONSTRUCTION COMPANY, INC.,
Petitioner,

vs.

PLUMBERS AND STEAMFITTERS LOCAL UNION NO. 100 OF UNITED ASSOCIATION OF JOURNEYMEN AND APPRENTICES OF THE PLUMBING AND PIPE-FITTING INDUSTRY OF THE UNITED STATES AND CANADA, AFL-CIO,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF ON BEHALF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, AS AMICUS CURIAE, IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-1256

CONNELL CONSTRUCTION COMPANY, INC.,
Petitioner,

vs.

PLUMBERS AND STEAMFITTERS LOCAL UNION NO. 100 OF UNITED ASSOCIATION OF JOURNEYMEN AND APPRENTICES OF THE PLUMBING AND PIPE-FITTING INDUSTRY OF THE UNITED STATES AND CANADA, AFL-CIO,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF ON BEHALF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, AS AMICUS CURIAE, IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI

INTEREST OF THE AMICUS CURIAE*

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1. The Chamber is a federation consisting of a membership of over 3,700 state and local chambers of commerce and trade and professional associations, a direct business membership in

* Consents of all parties to the Chamber's participation have been filed with this Court.

excess of 38,000 and an underlying membership of approximately 5,000,000 business firms and individuals. It is the largest association of business and professional organizations in the United States.

2. The Chamber regularly represents the interests of its member-employers in important labor relations matters vitally affecting those interests. Such representation constitutes a significant aspect of the Chamber's functions. Accordingly, the Chamber has sought to advance those interests in a wide spectrum of labor relations litigation.*

3. The question presented in the instant case is whether a building trade union violates the antitrust laws by compelling an employer with whom it has no collective bargaining relationship to execute an agreement requiring it to cease doing business with non-union employers and restricting the persons within the construction industry with whom the employer may do business to those who have a collective bargaining agreement with that union. This matter is of particular concern to the Chamber's members since a significant number of them are users of construction products and services and are directly affected by schemes which impact upon construction costs. The holding of the court below would permit building trade unions to control business relationships between employers and dictate the costs of construction. Since virtually every time a union engages in conduct in violation of the Sherman Act it will contend that its

* *E.g., Gateway Coal Company* v. *United Mineworkers of America, et al.*, ... U. S. .... (Jan. 1974); *Super Tire Engineering Company, Supercap Corporation and A. Robert Schaevitz* v. *Lloyd W. McCorkle, et al.* (Supreme Court), No. 72-1554, *Marco DeFunis and Betty DeFunis, his wife; Marco DeFunis, Jr. and Lucia DeFunis, his wife* v. *Charles Odegaard, President of the University of Washington, et al.* (Supreme Court), No. 73-235; *Corning Glass Works* v. *Brennan* (Supreme Court) No. 73-29; *N. L. R. B.* v. *Bell Aerospace Company Division of Textron, Inc.* (Supreme Court), No. 72-1598; *Boys Markets* v. *Retail Clerks Union*, 398 U. S. 235 (1970); *N. L. R. B.* v. *The Boeing Company, et al.*, 93 S. Ct. 1952 (1973); *N. L. R. B.* v. *Granite State Joint Board*, 409 U. S. 213 (1972); *N. L. R. B.* v. *Pittsburgh Plate Glass Co.*, 404 U. S. 517 (1971).

conduct is immune from the proscriptions of the antitrust laws, the further question of whether that conduct is protected under the labor laws must be resolved by the court. If the decision of the court below is not examined by this Court, employers will be deprived of a judicial forum for the resolution of a question which affects their very life in the marketplace.

4. The problem presented here has not been resolved by this Court. The tension resulting from misunderstanding of this Court's *Jewel Tea* reconciliation of the policies represented by the labor laws and antitrust laws invites persistent and recurrent litigation. Because of its broad representation of employers, the Chamber is in a position to present arguments to the Court which might not otherwise be advanced by the parties.

REASONS FOR GRANTING THE WRIT

I.

SUMMARY OF REASONS FOR GRANTING THE WRIT

The instant case raises issues involving the historic clash between two national policies which are in basic conflict. Competition, the policy fostered by the antitrust laws, is the very heart of our economic system. Antitrust policy is designed to promote economic efficiency, consumer welfare and a system of diffused power. National labor policy, on the other hand, permits concentration of economic power in the hands of large national labor unions which gives them the capability to frustrate the goals of the antitrust laws.[1] The conceptual difficulty posed by this conflict has been a troublesome issue which this Court has traditionally resolved by accommodating the coverage of the antitrust laws to the policy of the labor laws.[2]

In the instant case, however, the court below failed to adhere to the historical analysis performed by this Court in the *Jewel Tea*[3] decision, which resulted in this Court's conclusion that unions, acting without non-labor co-participation could violate the provisions of the Federal Antitrust laws if they were not acting in pursuit of "legitimate labor interest"; that the pursuit of

1. Meltzer, *Labor Unions, Collective Bargaining and Antitrust Laws*, 32 U. Chi. L. Rev. 659 (1965).

2. See, *e.g.*, Cox, *Labor and the Antitrust Laws: Pennington and Jewel Tea*, 46 B. U. L. Rev. 317 (1966); DiCola, *Labor Antitrust: Pennington, Jewel Tea and Subsequent Meandering*, 33 U. Pitt. L. Rev. 705 (1972); Feller & Anker, *Analysis of Impact of Supreme Court's Antitrust Holdings*, 59 LRRM 103 (1965); Handler, *Labor and Antitrust: A Bit of History*, 40 Antitrust L. J. 233 (1971); Meltzer, *supra;* Summers, *Labor Law in the Supreme Court: 1964 Term*, 75 Yale L. J. 59 (1965); Comment, *Labor's Antitrust Exemption After Pennington and Jewel Tea*, 66 Col. L. Rev. 742 (1966).

3. *Local 189 Amalgamated Meat Cutters* v. *Jewel Tea Co.*, 381 U. S. 676 (1965).

such "legitimate labor interest" required a legitimate relationship between the union and the employer or employers upon whom the union was making demand; and that the measure of whether or not the "interest" being sought by the union was "legitimate" was whether that interest furthered some protected right guaranteed to the union or to employees whom the union represents by the National Labor Relations Act.

The avoidance by the court below of these specific teachings of this Court has imperiled the statutory safeguards which were Congressionally designed to permit free competition in the marketplace, has led to confusion as to the meaning of these statutory rights and obligations, and can only serve to contribute to proliferating conflict and litigation.

A definitive statement by this Court is required for a clear national understanding of not only the pronouncements of the *Jewel Tea* case as set forth above, but also for an awareness of the proper accommodation of the so-called construction industry proviso to Section 8(e) of the National Labor Relations Act with the Federal Antitrust Laws and the specific awareness that (1) a contract requiring a general contractor to terminate his business relationships with subcontractors who do not have a collective bargaining agreement with a union and to do business only with those who have such an agreement, as was sought here, even if it falls within the ambit of that proviso is not *protected* under the National Labor Relations Act, but simply not outlawed and, therefore, does not have the stature of a protected right such as was sought by the union in *Jewel Tea;* (2) that even if the contract sought was within the Proviso to Section 8(e), union activity in pursuance thereof which violates other provisions of the National Labor Relations Act taints all of the union's conduct and necessarily precludes such conduct from being in furtherance of a "legitimate labor interest"; and (3) that even if the union pursuing such agreement did not engage in other conduct specifically violating other provisions of the Act in that pursuit, the agreement and effort to obtain such agreement from

an employer with whom the union has neither a collective bargaining relationship nor any statutory right to a collective bargaining relationship is not within the ambit of the Section 8(e) proviso and necessarily precludes any effort to obtain such a contract from being in pursuit of a "legitimate labor interest".

For the foregoing reasons, each of which is more fully explicated hereinafter, it is of paramount concern to American industry in general and the myriad of directly affected employers, employees and unions concerned with the problem described herein that this Court should grant the Petition for Certiorari heretofore filed by the Petitioner herein.

II.

THE LOWER COURT FAILED TO ADHERE TO THIS COURT'S DECISION IN JEWEL TEA; THE RESULT OF THIS FAILURE IS THE DESTRUCTION OF COMPETITION IN AN ENTIRE INDUSTRY

In the instant case, the Respondent Union, through coercive picketing, forced from Petitioner Connell, a general contractor, an agreement that Connell would not contract with subcontractors for construction work unless those subcontractors were bound to a particular collective bargaining agreement executed with the Union.

There is no collective bargaining relationship between Connell and the Union, nor does the Union have any organizational interest in Connell's employees because Connell employs no category of employee which the Union seeks to represent. Moreover, the Union's objective could not have been an organizational interest in the subcontractor's employees on the job site involved, nor to gain or preserve any work for its members on the picketed job site since the subcontractor on that job employed members of the Union and had a collective bargaining agreement with it.[4]

4. Opinion of the Fifth Circuit, ... F. 2d at ....., 84 LRRM at 2002.

As a result of the subcontractors' agreement, coerced by the Union, Connell is restrained from doing business with any other employer until that employer enters into a "master" area collective bargaining agreement which the Union offers. The Union, once having forced the subcontractors' agreement from Connell, necessarily has the power to select the companies with whom Connell may do business. Indeed, the Union has a stranglehold on the entire construction industry within its work and area jurisdiction for if any subcontractor and the Union are unable to reach agreement as to the terms of a labor contract, that subcontractor cannot do business with any owner or general contractor, supplier, or manufacturer from whom the Union has obtained an agreement similar to the one coerced from Connell —even if that subcontractor's employees were already members of a labor organization other than the Union. Divorced from the collective bargaining context and having no organization or work preservation objective, the Union's subcontractors' agreement, its procurement and maintenance, are beyond the scope of legitimate labor activity and unprotected by the National Labor Relations Act. As such, the Union's activities are not exempt from the antitrust laws and are a violation thereof.

The Fifth Circuit below, however, found the Union's conduct and the subcontractors' agreement at issue immune from the antitrust laws by reasoning which failed to critically analyze relevant legislative history and case law. Instead, the majority below posited a test for Union immunity far broader than that conferred by the decision of this Court upon which the majority relied. While it recognized the principle established by this Court in *Jewel Tea*, that a labor organization can lose its Sections 6 and 20 Clayton Act[5] immunity and violate the antitrust laws by engaging in anti-competitive conduct which has no legitimate union interest, the majority below reasoned that a Union's conduct can promote a "legitimate union interest" regardless of whether the conduct is unlawful or unprotected under

5. 15 U. S. C. Sec. 17; 29 U. S. C. Sec. 52.

the National Labor Relations Act, as amended,[6] and regardless of whether the effect of such conduct constitutes an impermissible restraint on trade. The majority's failure to adhere to the teachings of *Jewel Tea* allowed the court to avoid consideration of the antitrust aspect and effects of the Union's conduct and to dismiss the antitrust suit, concluding that since the conduct complained of was arguably an unfair labor practice, the National Labor Relations Board should determine its legality under the National Labor Relations Act.

Thus, the majority below avoided the confrontation inherent in the instant case by reasoning which segregates rather than accommodates the operation of the antitrust laws with that of the labor laws. In doing so, the majority disregarded the specific teachings of *Jewel Tea* and failed to engage in the analysis mandated by the historical accommodation of those bodies of law.

The required analysis reveals that anti-competitive union conduct is unprotected under the labor laws and violates the antitrust laws.

III.

THE DECISION OF THE COURT BELOW IS CONTRARY TO JUDICIAL AND LEGISLATIVE HISTORY AND THE CONCEPT OF STATUTORY ACCOMMODATION; A LABOR ORGANIZATION WHICH RESTRAINS TRADE BY ENGAGING IN CONDUCT UNPROTECTED BY THE LABOR LAWS, VIOLATES THE ANTITRUST LAWS

The question presented in the instant case is whether Respondent, a building trade union, violates the antitrust laws by compelling Petitioner, with whom it has no collective bargaining relationship, to execute an agreement requiring Petitioner to cease doing business with non-union employers and restricting the permissible persons with whom it may do business to those having a particular collective bargaining agreement with Respondent. The teachings of *Jewel Tea* compel the conclusion, contrary to the decision of the Court below, that the described union conduct is not immune from coverage of the antitrust laws, but, rather, violative of the proscriptions contained therein.

6. 29 U. S. C. Sec. 151, *et seq.*

In *Jewel Tea, supra*, a union, which had a collective bargaining relationship with the employer, insisted upon an agreement limiting the employer's hours of operation. In *Jewel*, there was no conspiracy or combination with a non-labor source, yet this Court indicated that unions, acting unilaterally, can violate the Sherman Act, 15 U. S. C. Sec. 1, *et seq.*, if they restrain trade, and if their conduct is unrelated to legitimate labor activity.[7]

The Court considered the labor exemption "in light of national labor policy", *Jewel Tea, supra*, at 699, and stated that the question of exemption involved "acommodating the coverage of the Sherman Act to the policy of the labor laws." *Jewel Tea, supra*, at 689.

The Court made this accommodation and found that the agreement on hours of operation was a legitimate union objective because employees' particular hours of work was a subject within the "realm of 'wages, hours and other terms and conditions of employment" about which employers and unions must bargain under the National Labor Relations Act, and because the subject matter related to employees within the *particular bargaining unit* and affected working conditions of those bargaining unit employees. *Id.*, at 691. The Court noted, though, that union demands and agreements under certain circumstances could violate the antitrust laws:

> "[t]he *limitation* [unrelated to the working hours of the employees in the bargaining unit] *imposed by the unions might well be reduced to nothing but an effort by the unions to protect one group of employers from competition by another, which is conduct that is not exempt from*

7. The Union in *Jewel* urged that absent a conspiracy or combination with a non-labor source, no violation of antitrust laws could be maintained. This Court rejected the Union's contention. *Jewel Tea, supra*, at 688.

the Sherman Act. Whether there would be a violation of Sections 1 and 2 would then depend on whether the elements of a conspiracy in restraint of trade *or an attempt to monopolize had been proved*." *Id.* 692-3. (Emphasis supplied.)[8]

Thus, under *Jewel Tea*, unions acting unilaterally can violate

8. In the companion case, *United Mine Workers* v. *Pennington*, 381 U. S. 657 (1965), though that case did involve conspiracy between a union and employers, Mr. Justice White stated with respect to employer-union agreements which seek to regulate labor relations outside the bargaining unit:

> "From the viewpoint of antitrust policy, moreover, all such agreements between a group of employers and a union that the union will seek specified labor standards outside the bargaining unit suffer from a more basic defect, without regard to predatory intention or effect in the particular case. For the salient characteristic of such agreements is that the union surrenders its freedom of action with respect to its bargaining policy. Prior to the agreement the union might seek uniform standards in its own self-interest but would be required to assess in each case the probable costs and gains of a strike or other collective action to that end and thus might conclude that the objective of uniform standards should temporarily give way. After the agreement the union's interest would be bound in each case to that of the favored employer group. It is just such restraints upon the freedom of economic units to act according to their own choice and discretion that run counter to antitrust policy. See, *e.g.*, *Associated Press* v. *United States*, 326 U. S. 1, (1944), 19; *Fashion Originators' Guild* v. *Federal Trade Comm'n.*, 312 U. S. 457 (1941), 465; *Anderson* v. *Shipowners Assn.*, 272 U. S. 359 (1926), 364-365."

In the instant case, the only agreement that the union would sign with any subcontractor was a "master agreement" which provided:

> "The Union further agrees that during the life of this Agreement that it will not grant or enter into any arrangement or understanding with other employer which provides for any wages less than stipulated in this Agreement as the minimum wages for work under any more favorable term or conditions to the employer that are expressed or implied in this Agreement for less than the rate of wages indicated in this Agreement."

Thus, here the Union, by forcing general contractors, such as Connell, to sign the subcontractors agreement and then by permitting the subcontractors to sign only the "master agreement" containing the above provisions, engages in the type of monopolistic restraint condemned in *Pennington*.

the Sherman Act if they restrain trade for a favored class of employers and if their conduct is not legitimate labor activity.

Though this Court was fragmented in *Jewel Tea*, and this fragmentation of view has lead to the confusion which permeates this area,[9] one factor stands out clearly in the various opinions. Mr. Justice White, in his majority opinion, expressed the view that union-imposed restrictions would be antitrust exempt only if those provisions were intimately related to traditional areas of labor concern, such as wages, hours and working conditions, so as to come within the ambit of protection afforded by national labor policy. Mr. Justice Goldberg, in the concurring opinion, expressed a broader exemption, extending to all mandatory subjects of collective bargaining.[10] However, no matter which of these two views one follows, the critical factor in determining legitimacy in each instance is whether the object sought relates to a legitimate issue of collective bargaining between an employer and a union in a particular bargaining unit.

In the present case, unlike *Jewel Tea*, there is no bargaining relationship between Connell and the Union. Moreover, there is no basis for the establishment of such a relationship. Applying even the broader Goldberg formulation, the Union in the instant case could not have been insisting upon a mandatory bargaining subject because there was no collective bargaining relationship. The subcontractor agreements sought by the union are completely divorced from the collective bargaining context. They are the type of "extra-unit" agreement condemned in *Pennington*, *supra*, the net effect of which is restraint of the product market, accomplished by fixing the subcontractors' wage costs for the entire industry in the "master" collective bargaining agreement and by forcing the general contractors to cease doing business with those who do not accept the "master" agreement.[11] Such conduct has never in the history of labor's

9. See, authorities cited in Footnote 2, *supra*.

10. Mr. Justice Douglas, in his dissenting opinion, felt that since the limitation imposed by the union restricted competition in the marketing of goods and services, it was no different than price-fixing.

11. See, note 6, *supra*.

exemption from the antitrust laws been given immunity from their proscription.

A. The History of Labor's Immunity from the Antitrust Laws

The history of labor's exemption reveals that it has never been extended beyond the scope of legitimate labor activities involving the working conditions of employees in a given bargaining unit; that it has depended on whether the unions' activities have intentionally affected the product market in interstate commerce; and that it has depended on an accommodation of the federal labor and antitrust policies.

The Sherman Act provides no immunity for labor union conduct. Thus, at the outset, union secondary product boycotts were condemned antitrust activity. *Lowe* v. *Lawlor*, 208 U. S. 274 (1908). Even after passage of what has been termed the Clayton Act labor exemption,[12] only conduct in furtherance of a dispute between an employer and a union which represented that employer's employees, (a primary dispute), was exempt from the antitrust laws; but secondary disputes, which affected the product market were still illegal. *Duplex Printing Press Co.* v. *Deering*, 254 U. S. 433 (1921); *Bedford Cut Stone* v. *Journeymen Stonecutters Association*, 274 U. S. 37 (1927).[13]

Following enactment of the Wagner Act, this Court decided *Apex Hosiery* v. *Leader*, 310 U. S. 469 (1940). *Apex* involved a primary strike over a union's demands for a union security clause in any collective bargaining agreement negotiated between it and the primary employer. The strike delayed interstate transportation of the employer's goods. However,

12. Clayton Act, Section 6, 15 U. S. C. Sec. 17, and Sec. 20, 29 U. S. C. Sec 52.

13. Of course, the requisite intent or effect of the union's conduct on the product market must be demonstrated in all cases. *United Leather Workers* v. *Heckert*, 265 U. S. 457 (1924); *Mine Workers* v. *Coronado Co.*, 259 U. S. 344 (1922), [Coronado I]; *Mine Workers* v. *Coronado Co.*, 268 U. S. 295 (1925) [Coronado II].

this Court found that such primary activity did not violate the Sherman Act. The Court recognized that while a labor strike in a collective bargaining context necessarily impacts upon the primary employer's competitive position, such impact is an effect that results from restraint on the labor market, rather than on the product market, which, in a primary dispute, renders the conduct free from antitrust proscription. *Apex* at 504.

In the year following *Apex*, the Court decided *United States* v. *Hutcheson*, 312 U. S. 219 (1941). *Hutcheson* was a criminal prosecution under the antitrust laws which involved a jurisdictional dispute between two unions over a work assignment on a building site for Anheuser-Busch. The union which failed to get the assignment organized a strike among employees of contractors working on the site and instituted a boycott of the Company's beer. Although the union's secondary activity would have been a violation of the antitrust laws under *Duplex* and other earlier cases, the Court found that since the Congress had removed union secondary conduct from the injunctive powers of the federal courts by enactment of the Norris-LaGuardia Act,[14] such conduct, protected by Norris-LaGuardia, could not be violative of the Sherman Act. *Hutcheson, supra*, at 236. Thus, the Court accommodated the coverage of the antitrust law with the protection afforded by the labor law. If the same accommodation were made in the instant case, Respondent's activities, which are now prohibited by the National Labor Relations Act, as amended, and unprotected by the labors laws are, therefore, subject to Sherman Act proscription.

B. Accommodation of the National Labor Relations Act, As Amended, with the Sherman Act, Requires Finding That Union Secondary Boycotts Can Violate Antitrust Laws

Although this Court has attempted to accommodate the often conflicting labor and antitrust policies, it has never directly con-

14. 29 U. S. C. Sections 101-115.

sidered the issue in terms of the impact of the 1947 Taft-Hartley amendments or the 1959 Landrum-Griffin amendments on the Sherman Act. An accommodation of the Sherman Act with the National Labor Relations Act, as amended, confirms that unions may be subject to the Sherman Act, without co-participation of non-labor sources when their conduct violates the Labor Act.

Congress, in 1947, outlawed the secondary boycott, partially in response to, and to overrule, the dictum in *Allen-Bradley* v. *Local 3*, 325 U. S. 797 (1945), that the union's hot cargo boycott, without employer complicity, would be legal under the Sherman Act.[15] The Taft-Hartley prohibition on secondary boycotts rendered unlawful and enjoinable that which before had been protected by Norris LaGuardia.

Accommodating antitrust and labor legislation, as amended by Taft-Hartley, requires a holding contrary to *Hutcheson* and contrary to the *Allen-Bradley* dictum referred to above. Since secondary boycotts were outlawed in 1947, unions engaging in such activity are subject to Sherman Act liability if the requisite restraint on competition and the product market be shown.

This Court confirmed this analysis in the case of *National Woodwork Manufacturers* v. *N. L. R. B.*, 386 U. S. 612 (1967)[16] where it reviewed the legislative history of the Taft-Hartley Act, and quoted the following Conference Report:[17]

> " 'Under clause (A) strikes or boycotts, or attempts to induce or encourage such action, were made unfair labor practices if the purpose was to force an employer or other person to cease using, selling, handling, transporting, or otherwise dealing in the products of another, or to cease doing business with any other person. Thus it was made an unfair labor practice for a union to engage in a strike against employer A for the purpose of forcing that employer to cease doing business with employer B. Similarly it would not be lawful for a union to boycott employer A because employer A uses or otherwise deals in the goods of, or does business with, employer B.' *Id.* at 631-2.

15. See 325 U. S. 797, 809-810 (1945).

16. That case held the hot cargo sanctions wrought by the Landrum-Griffin Bill's addition of Section 8(e) to the National Labor Relations Act of 1959 were to be interpreted as prohibiting agreements with secondary, but not primary, objectives. See, *infra*, at pp. 21-22.

17. H. R. Conf. Rep. No. 510, 80th Cong.; 1st Sess., 43.

The Court concluded:

> "In effect Congress, in enacting Section 8(b)(4)(A) of the Act, returned to the regime of *Duplex Printing Press Co.* and *Bedford Cut Stone Co.*" *Ibid.*

Thus, as under *Duplex*, a union, unilaterally conducting secondary boycotts prohibited under the labor law, violates the Sherman Act if the effect of restraint on the product market is, as herein, present. The question, then, under *Jewel Tea*, is whether the union's activity is protected by the Landrum-Griffin amendments to the National Labor Relations Act.

IV.

THE PRECISE SCOPE AND LIMITATIONS OF THE CONSTRUCTION INDUSTRY PROVISO TO SECTION 8(e) OF THE NATIONAL LABOR RELATIONS ACT, AS AMENDED, HAVE NEVER BEEN CONSIDERED BY THIS COURT; WHETHER THE UNION'S ACTIVITY IN RESTRAINT OF TRADE IN THE INSTANT CASE SERVES A LEGITIMATE LABOR INTEREST REQUIRES FULL DELINEATION OF THAT PROVISO

The issue that, under *Jewel Tea*, must be resolved and that the majority below failed to resolve in order to determine whether a union, by its conduct, violates the antitrust laws, is whether the activity complained of is protected by the National Labor Relations Act, as amended. In order to resolve the question in this case, inquiry into the nature and scope of the so-called construction industry proviso to Section 8(e) of the Act must be made. This Court has never considered a case requiring the

full delineation of this aspect of the Landrum-Griffin amendments. If this Court determines not to consider the instant matter, labor unions, through use of the proviso, would be permitted to restructure the construction industry in entire areas by eliminating non-union subcontractors and creating a monopoly for favored union subcontractors. Once a union, through the type of subcontractor agreement forced upon Petitioner herein, is able to either force non-union subcontractors from the industry or compel them to sign a collective bargaining agreement with the union, the union is then capable of controlling the market in the entire industry. If a subcontractor is unable to agree to the terms dictated by the union, he cannot obtain work and is driven from the market, as in *Pennington, supra*. Thus, the importance of this Court's considering and clearly defining the nature and scope of the Section 8(e) proviso is manifest.

A. The Proviso Does Not Raise Union Conduct Within Its Ambit to the Status of a Protected Right Under the Act Thereby Clothing Such Conduct with Immunity from the Antitrust Laws

The nature of the Section 8(e) proviso is best understood by examining both its antecedents and its place within the scheme of the Act.

Prior to the Landrum-Griffin amendments in 1959, this Court decided the *Sand Door* case, *United Brotherhood of Carpenters* v. *N. L. R. B.*, 357 U. S. 93 (1958). This Court then held that while a voluntarily agreed upon subcontractors' agreement between an employer and a union did not violate the Act, means prohibited by then Section 8(b)(4)(A) could not be employed by the union to enforce such an agreement.[18] As a result of

18. The Landrum-Griffin amendments made what was then Section 8(b)(4)(A) the present Section 8(b)(4)(B) and added the present Section 8(b)(4)(A). Those sections provide, in relevant part, that it shall be an unfair labor practice for a labor organization or its agents:

Sand Door, Congress sought to outlaw all "hot cargo" agreements; however, by way of a proviso, it exempted the construction industry from certain of the proscriptions of Section 8(e).[19] Thus, the proviso does not create or affirmatively grant the

> "(4)(i) to engage in, or to induce or encourage any individual employed by any person engaged in commerce or in an industry affecting commerce to engage in, a strike or a refusal in the course of his employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities, or to perform any services, or (ii) to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where in either case an object thereof is:
>
> "(A) forcing or requiring any employer or self-employed person to join any labor or employer organization or to enter into any agreement which is prohibited by Section 8(e);
>
> "(B) forcing or requiring any person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person, or forcing or requiring any other employer to recognize or bargain with a labor organization as the representative of his employees unless such labor organization has been certified as the representative of such employees under the provisions of section 9: Provided, that nothing contained in this clause (b) shall be construed to make unlawful, where not otherwise unlawful, any primary strike or primary picketing . . ."

19. Section 8(e) states:

"It shall be an unfair labor practice for any labor organization and any employer to enter into any contract or agreement, express or implied, whereby such employer ceases or refrains or agrees to cease or refrain from handling, using, selling, transporting or otherwise dealing in any of the products of any other employer, or to cease doing business with any other person, and any contract or agreement entered into heretofore or hereafter containing such an agreement shall be to such extent unenforceable and void: *Provided, that nothing in this subsection shall apply to an agreement between a labor organization and an employer in the construction industry relating to the contracting or subcontracting of work to be done at the site of the construction, alteration, painting or repair of a building, structure, or other work.*" (Emphasis added)

union "protected" rights;[20] it merely exempts certain subcontractors' agreements in the construction industry from the proscriptions of Section 8(e). The Union's reliance, below, on the Section 8(e) proviso, is based on its apparent view that conduct which comes within the ambit of the proviso is "protected" activity and that, therefore, it must serve a "legitimate union interest" immune from the antitrust laws. The statutory scheme further demonstrates the error of the Union's view.

Section 7 of the National Labor Relations Act sets forth the rights conferred thereunder. That Section grants rights under the Act to employees[21] and confers no protection and contains no grant of rights to employers nor to unions. Section 8 protects those employee rights granted in Section 7 by proscribing conduct on the part of employers and unions which Congress has deemed to violate those employee rights. Section 8 does not grant unions any rights and the proviso to Section 8(e) does not therefore protect any alleged union rights or interest. The proviso only exempts certain conduct within its ambit from the proscriptions of that subsection. It only renders that conduct *not* unlawful under that subsection. Thus, a subcontractors' agreement, such as the one involved herein, even if it is within the ambit of the 8(e) proviso is not protected under the Act. It is merely *not* unlawful. It still may be unlawful under other provisions of Section 8(b)(4)—or it may not. In either event, the agreement is not protected under the Act. Specifically, the Section 8(e) proviso is not a

20. As this Court found upon examination of the legislative history of the 1959 amendments, in *National Woodwork, supra,* at 634-635, Section 8(e), like the Taft-Hartley amendments of 1947, simply closed a loophole in the statutory scheme.

21. Section 7 provides:

> "Employees shall have the right of self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all such activities . . ."

mechanism that transforms an otherwise unlawful agreement or conduct into a protected agreement or conduct.

Therefore, whether under *Jewel Tea,* an agreement which is not unlawful under the National Labor Relations Act—but not protected by it—serves a "legitimate union interest" cannot be answered by reliance on the Section 8(e) proviso. The legitimacy of the subcontractors' agreement involved herein must stand on its own. It is not protected by the National Labor Relations Act and therefore granted no immunity thereunder from the proscriptions of the Sherman Act.

B. Union Activity in Pursuit of a Subcontractors' Agreement, Which Violates Other Sections of the Act, Precludes Such Conduct and Agreement from Being in Furtherance of a Legitimate Union Interest

Even if it be assumed that the subcontractors' agreement herein was not unlawful by reason of the construction industry proviso to Section 8(e), the Respondent's conduct remains an illegal secondary boycott under Section 8(b)(4), subsection (B), since *another objective* of defendants' conduct was to force Connell and other open shop contractors[22] to terminate existing business relationships.[23] This Court has held that it is sufficient, for a finding of an unlawful boycott under Section 8(b)(4),

22. The District Court found as a matter of fact that at the time the Union sent the contract in question to Connell, it had agreements with some seventy-five (75) contractors in the Dallas area . . . . F. Supp. . . . . , 78 LRRM 3012, 3013 (1971).

23. Connell, an open shop contractor, subcontracts work to both union and non-union subcontractors. Thus, when the Union, which expressly disavowed any interest in organizing Connell's own employees, assaults the Connell construction site, its dispute is not with Connell, it is with non-union subcontractors on other project sites. The Union's alleged objective is to induce, or coerce, suppliers to stop deliveries to Connell, and construction purchasers to cease doing business with Connell. Connell's only remedy is to terminate any relationship with open shop subcontractors, and take on union subcontractors. This objective is proscribed, rendering the defendants' acts illegal under Section 8(b)(4). *N. L. R. B.* v. *Local 825, Operating Engineers,* 400 U. S. 297 (1971).

that defendants have *an* illegal objective, *N. L. R. B.* v. *Denver Building Trades*, 341 U. S. 675 (1951). It has also been held that, assuming one of the objectives of a union's economic action is to obtain a subcontractors' agreement under the exemption provided the construction industry by Section 8(e), this is no defense to, and the union still is in violation of, Section 8(b)(4)(B) when it is clear, as evidence herein discloses, that another objective is to force the neutral employer (Petitioner and other open shop contractors) to terminate existing business relationships, *Hod Carriers*, 154 NLRB 1744 (1965), *enf'd.*, 384 F. 2d 1000 (C. A. 9, 1967).[24] It can hardly be disputed that the defendants actively sought to force and succeeded in forcing Petitioner to terminate its relationships with open shop subcontractors.[25] This Court cannot allow to stand the lower court's holding that the subcontractors' agreement, obtained by such unlawful means, is legitimate and thus immune from the antitrust laws.

However, as fully explicated below, the agreement sought and obtained by the Union herein was not a lawful agreement within the ambit of Section 8(e), even if the Union had engaged in no conduct violative of 8(b)(4)(B), and the conduct engaged in

24. Since this Court decided the *Denver Building Trades* case, no less than five times have certain members of Congress attempted without success to overrule that decision by amending Section 8(b)(4) to permit "situs picketing" on construction projects. See, H. R. 9070, 9089, 9100, 9123, 9140, 9175, 86th Cong., 1st Sess., and H. R. 9373, 86th Cong., 2nd Sess. (1960); S. 2643, 86th Cong. 2nd Sess. (1960); H. R. 10027, 89th Cong., 1st Sess. (1965); H. R. 100, 90th Cong., 1st Sess. (1967); H. R. 100, 91st Cong., 1st Sess. (1969). Thus, even though Congress enacted the 8(e) proviso in 1959, it is clear that Congress has rejected repeated attempts to make lawful conduct proscribed under 8(b)(4)(B).

25. The District Court found that after Connell was coerced into signing the agreement in question, it lost two jobs in which the successful contractor contracted with Texas Distributors to do the mechanical work. The District Court further found that Texas Distributors is a non-union firm with whom Connell had contracted to perform the mechanical work, on occasion, for a period in excess of ten (10) years .... F. Supp. ....., 78 LRRM 3012, 3013 (1971).

by the Union to compel Connell's compliance with its terms was, therefore, equally unlawful under Section 8(b)(4)(A) and 8(e).

C. The Respondent's Subcontractors' Agreement and Efforts to Obtain It Are Violative of Section 8(b)(4)(A) and 8(e) Notwithstanding the Construction Industry Proviso

Prior to the enactment of Section 8(e), this Court had condemned union activities under the then existing Taft-Hartley ban on secondary boycotts when such activities were directed against a neutral employer in the construction industry, *N. L. R. B.* v. *Denver Building Trades Council, supra;* and in the *Sand Door* case, *supra*, the Court held unlawful coercive conduct designed to enforce a "hot cargo" agreement. By enacting the proviso to Section 8(e), Congress did not legitimize coercive picketing as a means of obtaining subcontractors' agreements,[26] and did no more than preserve the state of the law with respect to such conduct as existed prior to 1959.[27] Construction unions, post 1959, therefore, enjoy no privilege to engage in coercive picketing to obtain subcontractors' agreements from a neutral employer. Such conduct is still unlawful.

In *National Woodwork, supra,* the Court considered whether a work preservation clause *in a collective bargaining agreement* between an employer and the union which represented the employer's employees violated the secondary boycott provisions of the Act. The Court held that such a *primary* clause was within

26. Then Senator Kennedy said,

> "Since the [8(e)] proviso does not relate to Section 8(b)(4), strikes and picketing to enforce the contracts excepted by the proviso will continue to be illegal under Section 8(b)(4) whenever the *Sand Door* case is applied. It is not intended to change the law with respect to the judicial enforcement of these contracts, or with respect to the legality of a strike to obtain such a contract." II Leg. History of the Labor Management Reporting and Disclosure Act of 1959 at 1433.

27. See, I Leg. History of the Labor Management Reporting and Disclosure Act of 1959 at 943-944.

the proviso to Section 8(e), and that the union's boycott to maintain the clause, therefore, did not violate Section 8(b)(4)(B). However, in upholding the legality of the work preservation clause as being within the ambit of Section 8(e), the Court said:

> "The touchstone is whether the agreement or its maintenance is addressed to the labor relations of the contracting employee *vis-a-vis* his own employees." 386 U. S. at 645.

The Union's conduct in the instant case fails to meet this test. Petitioner and Respondent have no collective bargaining relationship. There is no basis for such relationship since Petitioner employs no employees who perform the plumbing or mechanical work within the Respondent's trade jurisdiction. Further, the Respondent expressly disavowed any interest in representing Petitioner's employees. Moreover, the Respondent's conduct was not for the purpose of preserving any site work on the picketed job because the plumbing subcontractor on that job had a collective bargaining agreement with the union. The subcontractors' agreement and the Respondent's conduct were tactically directed elsewhere. Such conduct is condemned by *National Woodwork*.

However, this Court has never considered the precise question of whether, absent a collective bargaining relationship, the type of agreement and the conduct utilized to obtain it, as is involved herein, violates Section 8(e) and Section 8(b)(4)(A). *National Woodwork* clearly indicates that the conduct is so proscribed. Conduct so proscribed cannot be legitimate labor activity. Further, the Court, in *National Woodwork*, expressly declined to give any view as to the antitrust limitations of such agreements or conduct.[28] The instant case presents these novel issues for consideration.

28. *National Woodwork*, at 629-630.

V.

THE COURT BELOW ERRONEOUSLY FAILED TO ADJUDICATE QUESTIONS OF LABOR LAW ARISING IN THE CONTEXT OF AND VITAL TO DETERMINATION OF THE INSTANT ANTITRUST SUIT

The Fifth Circuit concluded that since the Union's conduct involved herein, in addition to being an alleged violation of the antitrust laws, is arguably an unfair labor practice, the district court below was precluded from deciding the issue. This conclusion is contrary to the dictates of this Court and leaves the Petitioner and all others faced with like demands and conduct on the part of unions without a forum for adjudication of the legality of those demands and conduct.

In *Jewel Tea, supra*, one of the questions considered on certiorari was:

> "Whether a claimed violation of the Sherman Antitrust Act which falls within the regulatory scope of the National Labor Relations Act is within the exclusive primary jurisdiction of the National Labor Relations Board." *Id.* at 684.

This Court answered this question in the negative and held that federal courts could determine Sherman Act complaints against unions even though the unlawful behavior was arguably an unfair labor practice:

> "[W]e cannot conclude that this is a proper case for application of the doctrine of primary jurisdiction.
>
> To begin with, courts are themselves not without experience in classifying bargaining subjects as terms or conditions of employment. Just such a determination must be frequently made when a court's jurisdiction to issue an injunction affecting a labor dispute is challenged under the Norris-LaGuardia Act, which defines 'labor dispute' as including 'any controversy concerning terms or conditions of employment', Norris-LaGuardia Act, Section 13(c), 47 Stat. 73, 29 U. S. C. Section 113(c) (1958 ed.). See *Order of Railroad Telegraphers* v. *Chicago & N. W. R. Co.*, 362

U. S. 330; *Bakery Drivers Union* v. *Wagshal*, 333 U. S. 437; cf. *Teamsters Union* v. *Oliver*, 358 U. S. 283.

Secondly, the doctrine of primary jurisdiction is not a doctrine of futility; it does not require resort to an expensive and merely delaying administrative proceeding when the case must eventually be decided on a controlling legal issue wholly unrelated to determinations for the ascertainment of which the proceeding was sent to the agency. *Maritime Board* v. *Isbrandtsen Co.*, 356 U. S. 481, 521 (Frankfurter, Jr., dissenting).

Finally, we must reject the union's primary jurisdiction contention because of the absence of an available procedure for obtaining a Board determination." *Id.* at 686-7.

The Fifth Circuit's assertion is contrary to the dictates set forth above.

First, the district courts are conversant with illegal secondary boycotts, both in injunctive proceedings brought by the NLRB and in damage actions brought by aggrieved persons under Section 303 of the Labor Management Relations Act, 29 USC Sec. 187(b). If this Court felt that the federal courts were competent to assert jurisdiction in *Jewel Tea*, where the alleged restraint of trade involved consideration of whether matters were properly subject to legitimate collective bargaining, —matters particularly within the Board's expertise—then certainly, the courts are competent to adjudicate the issue here, where there is no requirement for Board expertise.

Second, as Judge Clark's dissent points out with reference to a case involving a similar contract sent by the same Union to another contractor in the Dallas area, deferral to the Labor Board would be futile since the antitrust issue must ultimately be determined by the courts, and the Board's General Counsel refuses to issue unfair labor practice complaints in this type of case.

Finally, there is no procedure under the National Labor Relations Act by which parties to a pending antitrust action can be assured of obtaining a Board ruling on the labor law issue alleg-

edly within the Board's primary jurisdiction. Unlike some regulatory agencies, the Board's adjudicative process is not automatically put into operation by the filing of a complaint with it. Rather, there is a two step procedure. First, an unfair labor practice charge must be filed with a Regional Director of the Board, National Labor Relations Act, as amended, Section 10(b), 29 U. S. C. Sec. 160(b). An investigation of the charge is conducted under the direction of the Regional Director and on the basis of an investigation of the charge, the General Counsel, acting through the Regional Director, decides whether to issue a formal complaint or dismiss the case, National Labor Relations Act, as amended, Section 3(d) of the Act, 29 U. S. C. Sec. 153(d). The General Counsel has " 'final authority' respecting investigation of charges, the issuance of complaints, and the prosecution of complaints before the Board." *Lewis* v. *National Labor Relations Board*, 357 U. S. 10 (1958), 15-16.

Thus, since the General Counsel refuses to issue a complaint, as he did in the *K. A. S.* case referred to by Judge Clark above, the Board's adjudicatory processes are unavailable to determine whether the conduct complained of constitutes an unfair labor practice. It would thus be futile for a district court to remit the parties to the Board. Even if the General Counsel were to change his position and issue a complaint in this type of case, and the Board determined that the conduct constituted an unfair labor practice, the question of whether the conduct also constitutes an antitrust violation must still go to the courts for resolution. Such a cumbersome and circuitous procedure would not serve to expedite the resolution of these vital issues.[29]

29. The Third and Sixth Circuits have attempted to circumvent this circuitous and futile procedure by certifying the labor law question to the Board. However, as the Board points out in its briefs to those courts, it has no procedures for issuing declaratory rulings on questions of labor law arising in antitrust litigation. Its only procedure for determining the unfair labor nature of conduct is through its regular processes. See, *International Association of Heat and Frost Workers and Asbestos Workers* v. *United Contractors Association, Inc. of Pittsburgh*, 483 F. 2d 384 (CA 3, 1973); *Carpenters District Council* v. *United Contractors Association of Ohio, Inc.*, ... F. 2d ...., 84 LRRM 2276 (CA 6, 1973).

This situation points out clearly the problems faced by both the courts and contractors, such as Petitioner, in cases which involve alleged Sherman Act violations which also involve unfair labor practice conduct of the type concerned with herein. There is a dislocation within the construction industry as a result of the Board's and the lower courts' failure to deal with the problem presented by the type of conduct involved herein. Building trade unions are, as a result, permitted to engage in unlawful conduct designed to coerce the acceptance of unlawful agreements and gain control of the entire construction industry, driving up the costs of construction to thousands of contractors and millions of consumers alike, and forcing contractors out of business. As a result of this dilemma, there is no forum except this Court for an answer to this serious problem that strikes at the very heart of our economic system and threatens to destroy competition in our nation's largest industry. A clear and definitive statement by this Court is necessary to resolve this most pressing problem and put an end to the proliferation of litigation that this dislocation has spawned.[30]

30. In addition to the instant case, see *e.g., International Association of Heat and Frost Proof Workers, supra; Carpenters District Council, supra; Altemose* v. *Building and Construction Trades Council*, No. 73-773 (E. D. Pa., 1973). Rather than open up the judicial floodgates to increased antitrust litigation, a definitive statement by this Court as to whether the union conduct involved herein constitutes legitimate labor activity under *Jewel Tea*, would, to a great degree, settle many questions common to all cases involving the scope of labor's immunity from the antitrust laws. To the extent that such guiding legal principles are clarified by this Court, protracted litigation is precluded, and judicial economy is served.

CONCLUSION

For the reasons stated above, in supplementation of those stated by Petitioner, it is urged that the Petition for Writ of certiorari herein be granted.

Respectfully submitted,

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Supreme Court, U. S.
FILED
JUL 18 1974
MICHAEL RODAK, JR., CLERK

APPENDIX

Supreme Court of the United States

Term, 1973

No. 73-1256

CONNELL CONSTRUCTION COMPANY, INC.,
Petitioner,

vs.

PLUMBERS AND STEAMFITTERS LOCAL UNION NO. 100, etc.,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR CERTIORARI FILED FEBRUARY 14, 1974 CERTIORARI GRANTED MAY 13, 1974

SUPREME COURT OF THE UNITED STATES

October Term 1973

NO. 73-1246

Connell Construction Company, Inc., Petitioner

vs.

Plumbers and Steamfitters Local Union No. 100, etc., Respondent

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DOCKET ENTRIES

In the United States District Court for the
Northern District of Texas, Dallas Division

CONNELL CONSTRUCTION COMPANY

versus No. CA-3-4455-B

PLUMBERS & STEAMFITTERS LOCAL UNION NO. 100, OF THE UNITED ASSOCIATION OF JOURNEYMEN AND APPRENTICES OF THE PLUMBING AND PIPEFITTERS INDUSTRY OF THE UNITED STATES AND CANADA, AFL-CIO

DATE	PROCEEDINGS
1971	
Jan. 29	Filed PETITION FOR REMOVAL and REMOVAL BOND.
Jan. 29	Filed Pltf's MOTION TO REMAND to the State Court, for lack of jurisdiction.
Feb. 1	Filed Plf's BRIEF in support of motion to remand to State Court.
Feb. 2	Filed ORDER setting hearing on 2/12/71 at 11 A.M. on plf's motion to remand. Copy to attorneys:
Feb. 8	Filed defts NOTICE OF REMOVAL.
Feb. 10	Filed deft's MOTION to dissolve and ANSWER & COUNTERCLAIM.
Feb. 10	Filed deft's BRIEF in opposition to motion to remand and in support of motion to dissolve.
Feb. 11	Filed MOTION for leave to file amicus brief and make oral argument by Dallas Chapter of Associated General Contractors.

Mar. 12 Filed ORDER denying deft's MOTION TO REMAND. Copy to Attys.

May 28 Filed plf's AMENDED COMPLAINT & ANSWER to counterclaim.

June 1 Filed PRETRIAL ORDER, plf shall amend by 5/28/71, set for trial 7/8/71 & trial briefs to be filed by 7 6 71.

Aug. 19 Filed STIPULATION for taking deposition upon written questions, to John A. Cinquemani.

Sept. 21 Filed DEPOSITIONS of Thomas Henger Stewart & Robert O. Burns.

Oct. 15 Filed BRIEF OF AMICUS ASSOCIATED GENERAL CONTRACTORS.

Nov. 9 Filed FINDINGS OF FACT & CONCLUSIONS OF LAW.

Nov. 18 Filed JUDGMENT after trial before the Court that plf take nothing and deft is granted declaratory relief pursuant to 28 USC Sec. 2201. Deft shall recover costs from plaintiff. (Copies mailed to attorneys of record). Contract is declared legal.

Nov. 26 Filed MOTION FOR AMENDED AND SUPPLEMENTAL FINDINGS OF FACT AND CONCLUSIONS OF LAW.

Nov. 29 Filed plf's MOTION FOR NEW TRIAL.

Dec. 17 Filed ORDER denying plf's motion for new trial and motion for amended & supplemental findings of fact & conclusions of law. (Copy mailed to attorneys of record)

1972

Jan. 4 Filed Ptf. Connell Construction Co., Inc.'s, NOTICE OF APPEAL Cy. of Notice mailed by appellant to appellee. (Cy. to Court of Appeals)

Jan. 10 Filed Pltf's BOND FOR COSTS ON APPEAL ($300 Surety)

Jan. 28 Filed TRANSCRIPT OF PROCEEDINGS held Oct. 12, 1971 with exhibits: PX-1, 2, 3, 4, 5, 5a, 6 and 6a
DX-1, 5, 6, 7, 8, 9, 10, 11

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[1] PLAINTIFF'S ORIGINAL PETITION

Filed: Jan. 21, 1971

In the District Court in and for the G-134th Judicial District, Dallas County, Texas

Connell Construction Company, Inc.

versus

Plumbers and Steamfitters Local Union No. 100, of the United Association of Journeymen and Apprentices of the Plumbing and Pipefitters Industry of the United States and Canada, AFL-CIO

TO THE HONORABLE JUDGE OF SAID COURT:

Comes now CONNELL CONSTRUCTION COMPANY, INC., hereinafter referred to as Plaintiff, complaining of PLUMBERS AND STEAMFITTERS LOCAL UNION NO. 100, OF THE UNITED ASSOCIATION OF JOURNEYMEN AND APPRENTICES OF THE PLUMBING AND PIPEFITTERS INDUSTRY OF THE UNITED STATES AND CANADA, AFL-CIO,

hereinafter referred to as Defendant, and as grounds for such Complaint, would respectfully show the Court as follows:

I.

Plaintiff is a Texas corporation engaged in the business of building construction, with its principal office located in Dallas County, Texas.

II.

Defendant is an Association, operating as a Union, in Dallas County, Texas, and service of process may be made upon it by serving Mr. O. D. (Dale) Seastrunk, or Mr. A. B. (Pat) Patterson, Business Agents of the Defendant, at Defendant's office located at 1727 Young Street, Dallas, Dallas County, Texas, or, in the alternative, service may be effected on the officer or agent in charge of Defendant's office at the same address.

III.

That, heretofore, on the 3rd day of December, 1970, Plaintiff received the letter attached hereto and incorporated herein as though fully set out and marked Exhibit "A", requesting that the Plaintiff sign the form of Agreement attached hereto and incorporated herein as though fully set out and marked Exhibit "B", which Agreement Plaintiff has not signed.

IV.

That, by such Agreement, the Defendant seeks to force Plaintiff to refrain and refuse in the future to

do business with any firm or company concerning any type of construction work falling within the trade jurisdiction claimed by the Defendant at construction sites if such firm or company does not have a contract with the Defendant. The last paragraph of such Agreement reads as follows:

> "THEREFORE, the contractor and the union mutually agree with respect to work falling within the scope of this agreement that is to be done at the site of construction, alteration, painting or repair of any building, structure, or other works, that is the contractor should contract or subcontract any of the aforesaid work falling within the normal trade jurisdiction of the union, said contractor shall contract or subcontract such work only to firms that are parties to an executed, current collective bargaining agreement with Local Union 100 of the United Association of Journeymen and Apprentices of the Plumbing and Pipe fitting Industry." (sic).

V.

That the Plaintiff has collective bargaining agreements with various unions representing its employees, however, Plaintiff has no collective bargaining agreement with the Defendant for the reason that it normally subcontracts its plumbing and mechanical portions of construction contracts to other firms or companies which regularly perform such work.

VI.

That at approximately 1:00 o'clock p.m. on the 15th day of January, 1971, the Defendant sent one of its members to picket the Plaintiff's construction work located at 8700 Stemmons Freeway, where Plaintiff is constructing a multi-story office building for Bruton Venture. The lettering on the picket sign being carried by the member of Defendant reads as follows:

"Connell Construction Co.
Gen. Cont.
Does not have a
Subcontract with
U.A.P.P. Local 100
We are picketing the
above employer only."

That upon the arrival of the member of Defendant carrying such picket sign on the jobsite, approximately One Hundred and fifty (150) men, some employees of Plaintiff and some employees of subcontractors, left the jobsite, refusing to work as long as the picket sign was on the abovesaid construction project. That such picketing by the Defendant of the Plaintiff's work site is for the sole purpose of forcing Plaintiff to sign the abovesaid illegal Agreement.

VII.

That on the 19th day of January, 1971, Plaintiff sent

a letter to Mr. Pat Patterson, Business Agent of the Defendant, informing Mr. Patterson that the Agreement the Defendant is trying to force on the Plaintiff is in violation of the Anti-Trust laws of this State and requesting that the picket line be removed; however, such picket has continued and is continuing at this time. A true and correct copy of such letter is attached hereto and incorporated fully herein and marked Exhibit "C".

VIII.

That the Plaintiff presently has subcontracts for plumbing and mechanical work only with firms who, in fact, do have collective bargaining agreements with the Defendant Union; however, the Defendant seeks to prevent Plaintiff from receiving bids and doing business on a competitive basis within the frame work of the free enterprise system by limiting Plaintiff's right to subcontract plumbing and mechanical work to only those companies who have a current executed collective bargaining contract with the Defendant. In this connection, Plaintiff would show the Court that in the past it has done business with numerous firms who, upon information and belief, did not have a collective bargaining agreement with the Defendant, and Plaintiff desires to retain its right to do business with such firms and others who may or may not have a current collective bargaining agreement with the Defendant.

IX.

That such proposed Agreement which Defendant seeks to force on the Plaintiff is an illegal agreement

in direct violation of the Anti-Trust laws of the State of Texas for the following reasons:

1. Such Agreement would create an illegal Trust between Plaintiff and Defendant as defined in Vernon's Texas Codes Annotated, Business and Commerce Code, Section 15.02(b), for the reason that such agreement would restrict trade, commerce and free pursuit of a lawful business, insofar as the Plaintiff's right to contract or do business with firms or companies which do not have a binding collective bargaining agreement with the Defendant.

2. Such Agreement, if entered into, would create an illegal conspiracy in restraint of trade between Plaintiff and Defendant as explicitly prohibited by Section 15.03 of the Texas Business and Commerce Code, for the reason that such Agreement, as proposed by Defendant to the Plaintiff, would prohibit Plaintiff from dealing with, or doing business with third parties who did not have a binding collective bargaining agreement with the Defendant Union.

3. An Agreement in the form that Defendant is attempting to force on the Plaintiff is illegal as stated in Section 15.04 of the Texas Business and Commerce Code.

X.

That the Agreement which Defendant is attempting to force on the Plaintiff would cause the Plaintiff to subcontract work only to firms or companies who have an agreement with the Defendant; thereby making the Plaintiff a party to an Agreement which could be relied on to deny employment to persons who are not members of the Defendant Union, in violation of the Texas Right To Work Law, Article 5207 a V.A.C.S.

XI.

That the Plaintiff petitions this Court for a Declaratory Judgment that the proposed contract which Defendant is trying to force on it through the picketing of its construction project is illegal, being in violation of the Anti-Trust, and other Statutes of this State, and that all efforts, whether by picketing, coercion, economic pressure, or other means, to obtain such Agreement, or one similar thereto, are also illegal, and the Plaintiff further prays that should the Court find such contract to be illegal, that it issue a permanent injunction enjoining and restraining the Defendant from picketing or attempting in any other way, to force the Plaintiff to sign such Agreement as the one presented here, or any containing similar illegal terms.

XII.

That Plaintiff would further show the Court that the actions of the Defendant, in continuing to picket the Plaintiff's abovesaid construction project, are delay-

ing vital work on such construction project which involves a total contractual commitment in excess of FIVE MILLION ($5,000,000.00) DOLLARS; that Plaintiff is suffering, and will continue to suffer, irreparable harm and damage before notice may be given and a hearing held on a temporary injunction; therefore, Plaintiff would show the Court that Defendant, its agents, officers and members should be restrained and enjoined from picketing, handbilling, refusing to work, on said construction project, encouraging others to refuse to work on said construction project, or taking any other action for the purpose of requiring or forcing the Plaintiff to enter into an Agreement with the Defendant whereby Plaintiff is restricted from doing business with any firm or company now, or in the future. Therefore, Plaintiff petitions this Court to issue and enter a temporary restraining Order enjoining and restraining the Defendant, its officers, agents and members from the action complained of, such Order to remain in full force and effect until this Court may have a hearing and consider whether or not it should issue a Temporary Injunction restraining such actions pending a determination of this cause.

XIII.

Plaintiff would further show the Court that it has no adequate remedy at law to prevent the substantial monetary loss and damage it is sustaining and will continue to sustain unless this Court immediately issue its Temporary Restraining Order and subsequent Temporary Injunction until this Court can determine whether or not the Agreement the Defendant seeks from the Plaintiff is illegal.

WHEREFORE, PREMISES CONSIDERED, Plaintiff, CONNELL CONSTRUCTION COMPANY, INC., prays that the Court immediately issue its Temporary Restraining Order to continue until a hearing can be held on Plaintiff's application for Temporary Injunction, restraining and enjoining the Defendant Union, its agents, officers and members, from picketing, handbilling, or engaging in activity directly or indirectly designed to force or induce the Plaintiff to enter into a contract or agreement in the form attached hereto, or any form of agreement requiring the Plaintiff to cease doing business with any other firm or company, now or in the future, and Plaintiff further prays that the Court set a time and date, ordering the Defendant to appear and show cause herein, if any it has, why such Restraining Order should not be matured into a Temporary Injunction pending a final hearing herein, and that upon final hearing hereof, Plaintiff prays that the Court issue a Declaratory Judgment declaring the Agreement which Defendant is presently attempting to force the Plaintiff to enter into, as stated above, is illegal, in contravention of the valid Anti-Trust Statutes and/or other laws of the State of Texas, and that any attempts by whatever means, to obtain such an Agreement are likewise illegal, and that this Court issue a Permanent Injunction permanently enjoining and restraining the Defendant, its officers, agents and members from engaging in any activity, whether by picketing or other means to induce or force the Plaintiff to agree not to do business with any other firm or company which does not have a binding, cur-

rent, collective bargaining agreement with the Defendant, and Plaintiff further prays that it recover its costs herein expended and for such other and further relief, at law and in equity, special and general, to which it may show itself justly entitled.

Respectfully submitted,

SMITH, SMITH, DUNLAP & CANTERBURY
(Signed) JOE F. CANTERBURY, JR.
JOE F. CANTERBURY, JR.
4000 First National Bank Building
Dallas, Texas 75202 748-7051
Attorneys for Plaintiff

EXHIBIT A

UNITED ASSOCIATION
of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada

LOCAL UNION 100, CITY Dallas, STATE Texas, DATE November 25, 1970.

Connell Construction Company
10939 Shady Trail
Richardson, Texas 75220

Gentlemen:

This Local is engaged in a continuing effort to improve and protect the wages and work opportunities of those it represents through lawful and legitimate means. In this connection the enclosed contract has been prepared and is tendered to you with the request that you execute and return it to this Local.

The contract was drafted to conform to the provisions of Section 8 (e) of the Labor-Management Relations Act. Should you have any doubt as to its legality, please advise us promptly.

We hope that you will see fit to execute the enclosed contract. In the event you decide not to become a party to this agreement we would appreciate your early reply. Should we have not heard from you by Monday, December 7, 1970, we will interpret your silence as a rejection. In the event you should refuse to sign the enclosed contract, it is our intention to employ the lawful means available to us to protest this refusal.

By this proposed contract we do not seek for you to terminate any existing contractual or business relationship, nor do we seek to force or require your firm to recognize or bargain with this organization, and we do not seek to organize your employees. Our sole purpose in proposing the enclosed contract and any efforts that may in the future be made to obtain such contract are those purposes made lawful by Congress in the enactment of Section 8 (e) of the Labor-Management Relations Act.

Be assured that all activities by this Local to secure and/or enforce this contract will be in strict compliance with state and federal law. Should you ever have information to the contrary, please advise the undersigned promptly, so that any necessary steps can be taken to insure that there are no violations of the law.

We shall appreciate your consideration of this request.

Sincerely,

(Signed) A. B. "PAT" PATTERSON
A. B. Pat' Patterson
Business Agent
Plumbers & Steamfitters
Local Union No. 100

be
opeiu #277

EXHIBIT B

AGREEMENT

This Agreement entered into this ____ day of _____, 1970, by and between the signatory contractor, hereinafter referred to as Contractor, and Local Union No. 100 of the United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry hereinafter referred to as Union,

WITNESSETH

WHEREAS, the contractor and the union are engaged in the construction industry, and

WHEREAS, the contractor and the union desire to make an agreement applying in the event of subcontracting in accordance with Section 8 (e) of the Labor-Management Relations Act;

WHEREAS, it is understood that by this agreement the contractor does not grant, nor does the union seek, recognition as the collective bargaining representative of any employees of the signatory contractor; and

WHEREAS, it is further understood that the subcontracting limitation provided herein applies only to mechanical work which the contractor does not perform with his own employees but uniformly subcontracts to other firms;

THEREFORE, the contractor and the union mutually agree with respect to work falling within the scope of this agreement that is to be done at the site of construction, alteration, painting or repair of any building, structure, or other works, that is the contractor should contract or subcontract any of the aforesaid work falling within the normal trade jurisdiction of the union, said contractor shall contract or subcontract such work only to firms that are parties to an executed, current collective bargaining agreement with Local Union 100 of the United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry.

_____

Union

_____

Contractor

EXHIBIT C

January 19, 1971

Mr. Pat Patterson
Business Agent
Plumbers and Steam Fitters Union Local 100
1727 Young Street
Dallas, Texas 75201

Re: Picketing at Bruton Venture Project

Dear Mr. Patterson:

We are surprised that you are picketing our project located at 8700 Stemmons Freeway in an effort to force us to sign an agreement with you stating in effect that we cannot do business with any company that does not have an agreement with your Union. It is somewhat ironical that the very project that you are picketing on has a union mechanical subcontractor. If we should sign the agreement that you are trying to force on us, we would be in violation of the antitrust laws of the State of Texas. Therefore, we request that you withdraw your picket line.

Very truly yours,

CONNELL CONSTRUCTION CO., INC.

Thomas H. Stewart

THS:an

THE STATE OF TEXAS)

COUNTY OF DALLAS)

BEFORE ME, the undersigned authority, a Notary Public in and for said County and State, on this date personally appeared THOMAS H. STEWART, to me well known to be the President of CONNELL CONSTRUCTION COMPANY, INC. and a credible person of lawful age, qualified in all respects to make this Affidavit, who, being first duly sworn, on his oath says that he has read the foregoing Petition designed to be used in the cause of CONNELL CONSTRUCTION COMPANY, INC. vs. PLUMBERS AND STEAMFITTERS LOCAL UNION NO. 100, in the District Court of Dallas County, Texas, and knows the contents of such Petition and that such Petition and every statement and allegation of fact thereof is true and correct.

(Signed) THOMAS H. STEWART
THOMAS H. STEWART,
Affiant

SUBSCRIBED AND SWORN TO before me by the said THOMAS H. STEWART at Dallas, Texas, this 21st day of January, 1971, to certify which witness my hand and seal of office.

(Signed) TERESA DILLARD
Notary Public in and for
Dallas County, Texas

TEMPORARY RESTRAINING ORDER

THE STATE OF TEXAS

TO

PLUMBERS AND STEAMFITTERS LOCAL UNION NO. 100

WHEREAS, in a certain suit pending in the District Court of the 134th Judicial District of Texas, wherein CONNELL CONSTRUCTION COMPANY, INC. Plaintiff and PLUMBERS AND STEAMFITTERS LOCAL UNION NO. 100, OF THE UNITED ASSOC. OF JOURNEYMEN & APPRENTICES OF THE PLUMBING AND PIPEFITTERS INDUSTRY OF THE UNITED STATES AND CANADA, AFL-CIO Defendant, the said PLAINTIFF prayed for and obtained from the Hon. CHARLES E. LONG, JR. Judge of the 134th Judicial District, his most gracious TEMPORARY RESTRAINING ORDER and the said Plaintiff having given bond, as required by the fiat of the judge of the 134th Judicial District Court.

Now, Therefore, you, the said PLUMBERS AND STEAMFITTERS LOCAL UNION NO. 100 your Counselors, Solicitors, Attorneys, Agents, Servants and employees are hereby commanded to DESIST and REFRAIN from picketing, handbilling, or participating in such activity directly or indirectly, in person or by other means CONNELL CONSTRUCTION CO., INC., either at its construction site located at 8700 Stemmons Freeway, Dallas, Texas, such construction site being a multi-story office building project for Bruton Ven-

ture, or at any other location within the jurisdiction of this Court, where an object of such picketing, handbilling, or similar activity is to force, require, or induce, the said CONNELL CONSTRUCTION CO., INC. to sign and enter into an agreement in the form attached to Plaintiff's Original Petition, or into any form of contract or agreement requiring the Plaintiff to agree not to do business now or in the future with any other firm, company or person. Its officers, agents, and members, are restrained and enjoined from taking any action whatsoever, directly or indirectly, in person or by agents, to obtain such an agreement or contract from the Plaintiff until formal hearing is held herein.

until the further order of the District Court to be holden within and for the County of Dallas Judicial District of Texas at the Courthouse thereof, in the City of Dallas, at 9:30 A.M. on Feb. 1, 1971 A.D. 19 , when and where this writ is returnable.

HEREIN FAIL NOT, under the penalty of the law.

WITNESS: BILL SHAW, Clerk of the District Courts of Dallas County, Texas.

Given under my hand and the seal of said Court, at office in the City of Dallas, this 21st day of January A.D. 1971

Attest: BILL SHAW,
Clerk District Courts,
Dallas County, Texas.

(Signed) KAYE ROPER
Kaye Roper
Deputy.

[6] DEFENDANTS MOTION TO DISSOLVE, ORIGINAL ANSWER AND COUNTER CLAIM

(Number and Title Omitted)

Filed: Feb. 10, 1971

TO THE HONORABLE JUDGE OF SAID COURT:

Comes now the Defendant Plumbers and Steamfitters Local Union No. 100 and in response to Plaintiff's Original Petition would respectfully show the Court:

MOTION TO DISSOLVE TEMPORARY RESTRAINING ORDER

The state court in which this proceeding was originally filed granted a temporary restraining order, without notice or an opportunity to be heard, restraining the Defendant from peaceful picketing in support of its lawful demand for a subcontractor agreement. Although the Defendant does not concede that the injunction continues in force and effect, in order that there be no question concerning the vitality of the injunction, Defendant requests that it be dissolved inasmuch as it was issued by the state court in excess of its jurisdiction, and inasmuch as this controversy is one affecting interstate commerce and rising under the federal labor statutes, thereby preempting the state courts of jurisdiction over the controversy; and the injunction should be dissolved for the further reason that this matter has been properly removed to the federal court, and the federal court is prohibited by virtue of the provisions of the Norris-La-Guardia Act, 29 U.S.C. Section 104, from granting or maintaining in effect the injunctive relief sought by the Plaintiff.

DEFENDANT'S ANSWER

1.

Defendant admits the allegations of paragraph I of Plaintiff's Original Petition.

2.

Defendant is an unincorporated association, and a labor organization as that term is defined in the National Labor Relations Act and the other federal statutes governing labor management relations. Defendant acknowledges proper service of this action.

3.

Defendant admits the allegations of Paragraph III of Plaintiff's Original Petition.

4.

Paragraph IV of Plaintiff's Original Petition accurately quotes the contract proposed to the Plaintiff, and Defendant asserts that the contract, as is made explicit in the face of the agreement, is "in accordance with Section 8(e) of the Labor-Management Relations Act."

5.

The allegations of paragraph V of Plaintiff's Original Petition are correct insofar as this Defendant is aware, and these allegations are admitted.

6.

Defendant concedes that on or about the date indicated and at the location indicated the Defendant did engage in peaceful primary picketing of the Plaintiff with a picket sign that read substantially as alleged in paragraph VI of Plaintiff's Original Petition. Defendant is not sufficiently advised of the facts to either admit or deny paragraph VI insofar as it alleges that there were work stoppages by some one hundred and fifty employees. Defendant admits, and indeed alleges that the picketing was for the sole purpose of securing Plaintiff's agreement to the proposed contract, which contract has been made expressly lawful by Section 8(e) of the Labor-Management Relations Act, and the decisions thereunder by the National Labor Relations Board and the federal courts in interpreting and applying the aforesaid provision of federal law.

7.

Defendant acknowledges receiving the letter attached as Exhibit C and states that before it had an opportunity to respond to the letter Plaintiff filed suit in the state court and obtained a temporary restraining order without any prior notification to Defendant or Defendant's counsel without affording an opportunity to the Defendant to be heard in defense of its conduct.

8.

With respect to the allegations of paragraph VIII of Plaintiff's Original Petition, Defendant does not dispute the factual allegations therein contained. It does, however, assert affirmatively that the contract which Defendant seeks is one that Congress has expressly made lawful, and one that the state courts of Texas are deprived of jurisdiction to invalidate.

9.

Defendant denies the allegations of paragraph IX, and says that Congress having authorized the agreement in question, the anti-trust laws of the State of Texas are inoperable inasmuch as this is a field of law that has been exclusively occupied by federal legislation.

10.

The Defendant denies the allegations contained in paragraph X both as to the factual assertions and legal conclusions, and asserts as in the preceding paragraph that the field having been occupied by federal legislation, the Texas right to work law is inoperable.

11.

With respect to the allegations of paragraph XI, Defendant denies that there is jurisdiction in either the state or federal court to enjoin the picketing in question and asserts that as appears in its counter claim hereinafter pled, Defendant is entitled to declaratory

judgment declaring that the contract it seeks is lawful and that the statutes of the State of Texas may not be relied upon to invalidate the contract.

12.

With respect to the allegations of paragraph XII of Plaintiff's Original Petition, Defendant concedes that the amount in controversy is in excess of $10,000.00 as alleged by Plaintiff's Original Petition and concedes that the controversy clearly affects interstate commerce within the meaning of the Labor-Management Relations Act as amended. As to the balance of the allegations therein contained and the legal conclusions therein contained, they are denied.

13.

Defendant denies the allegations of paragraph XIII of Plaintiff's Original Petition.

14.

By way of counter claim the Defendant asserts that the contract it seeks is lawful, expressly authorized by Congress in Section 8(e) of the Labor Management Relations Act as amended, and that the Defendant is entitled to declaratory judgment declaring that the contract it seeks is lawful and expressly authorized by Congress in the enactment of Section 8(e) of the Labor-Management Relations Act. Further, Defendant is entitled to a declaration that the agreement in question, having been authorized by Congress, may not be invalidated by the operation of state law.

WHEREFORE, premises considered, Defendant prays that it be granted declaratory relief as prayed for above, that the Plaintiff's prayer for relief be in all things denied, and that the Defendant recover its costs.

Respectfully submitted,

CLINTON & RICHARDS
205 TEXAS AFL-CIO BLDG.
308 West 11th Street
Austin, Texas 78701

(Signed) DAVID R. RICHARDS
David R. Richards

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[9] PLAINTIFF'S AMENDED COMPLAINT AND ANSWER TO THE DEFENDANT'S COUNTERCLAIM

(Number and Title Omitted)

Filed: May 28, 1971

TO THE HONORABLE UNITED STATES DISTRICT JUDGE:

Comes now CONNELL CONSTRUCTION COMPANY, INC., Plaintiff herein, and files this its Amended

Complaint and Answer to the Defendant's Counterclaim, complaining of PLUMBERS AND STEAMFITTERS LOCAL UNION NO. 100, OF THE UNITED ASSOCIATION OF JOURNEYMEN AND APPRENTICES OF THE PLUMBING AND PIPEFITTERS INDUSTRY OF THE UNITED STATES AND CANADA, AFL-CIO, and would respectfully show the Court as follows:

I.

This cause was originally filed in the 134th District Court in and for Dallas County, Texas. The Defendant filed a Petition with this Court for removal, to which Petition Plaintiff responded with a Motion to Remand. This Court has entered its Order Denying Plaintiff's Motion to Remand, to which Order Plaintiff excepts and objects.

II.

Plaintiff is a Texas corporation engaged in the business of building construction, with its principal office located in Dallas County, Texas;

Defendant is an association operating as a Union in Dallas County, Texas, and service of process has been effected upon the Defendant;

This Court has heretofore held that it has jurisdiction over this cause of action by refusing to remand it to the State Court; Plaintiff further invokes this Court's jurisdiction pursuant to 15 USCA §4 and the Federal Declaratory Judgment Act. 28 USCA §2201, et seq.

III.

That, heretofore, on the 3rd day of December, 1970, Plaintiff received the letter attached hereto and incorporated herein as though fully set out and marked Exhibit "A", requesting that the Plaintiff sign the form of Agreement attached hereto and incorporated herein as though fully set out and marked Exhibit "B", which Agreement Plaintiff has not signed.

IV.

That, by such Agreement, the Defendant seeks to force Plaintiff to refrain and refuse in the future to do business with any firm or company concerning any type of construction work falling within the trade jurisdiction claimed by the Defendant at construction sites if such firm or company does not have a contract with the Defendant. The last paragraph of such Agreement reads as follows:

> "THEREFORE, the contractor and the union mutually agree with respect to work falling within the scope of this agreement that is to be done at the site of construction, alteration, painting or repair of any building, structure, or other works, that is the contractor should contract or subcontract any of the aforesaid work falling within the normal trade jurisdiction of the union, said contractor shall contract or subcontract such work only to firms that are parties to an executed, current collective bargaining agreement with Local Union 100 of

the United Association of Journeymen and Apprentices of the Plumbing and Pipe fitting Industry." (sic).

V.

That the Plaintiff has collective bargaining agreements with various unions representing its employees, however, Plaintiff has no collective bargaining agreement with the Defendant for the reason that it subcontracts its plumbing and mechanical portions of construction contracts to other firms or companies which regularly perform such work, and the Plaintiff has no employees represented by the Defendant herein.

VI.

That at approximately 1:00 o'clock p.m., on the 15th day of January, 1971, the Defendant sent one of its members to picket the Plaintiff's construction work located at 8700 Stemmons Freeway, where Plaintiff is constructing a multi-story office building for Bruton Venture. The lettering on the picket sign being carried by the member of Defendant read as follows:

"Connell Construction Co.
Gen. Cont.
Does not have a
Subcontract with
U.A.P.P. Local 100
We are picketing the
Above employer only."

That upon the arrival of the member of Defendant carrying such picket sign on the jobsite, approximately One Hundred and Fifty (150) men, some employees of Plaintiff and some employees of subcontractors, left the jobsite, refusing to work as long as the picket sign was on the abovesaid construction project. That such picketing by the Defendant of the Plaintiff's worksite was for the sole purpose of forcing Plaintiff to sign the abovesaid illegal Agreement.

VII.

That, on the 19th day of January 1971, Plaintiff sent a letter to Mr. Pat Patterson, Business Agent of the Defendant, informing Mr. Patterson that the Agreement the Defendant is trying to force on the Plaintiff is in violation of the Anti-Trust laws of this State and requesting that the picket line be removed; however, such picket was not removed until the 134th District Court entered its Temporary Restraining Order. A true and correct copy of such letter is attached hereto and incorporated fully herein and marked Exhibit "C".

VIII.

That the Plaintiff presently has subcontracts for plumbing and mechanical work only with firms who, in fact, do have collective bargaining agreements with the Defendant Union; however, the Defendant seeks to prevent the Plaintiff from receiving bids and doing business on a competitive basis within the framework of the free enterprise system by limiting Plaintiff's right to subcontract plumbing and mechanical work to only those companies who have current executed collective bargaining contracts with the Defendant. In

this connection, Plaintiff would show the Court that in the past it has done business with numerous firms who, upon information and belief, did not have a collective bargaining agreement with the Defendant, and Plaintiff desires to retain its right to do business with such firms and others who may or may not have a current collective bargaining agreement with the Defendant.

IX.

That such proposed Agreement which Defendant seeks to force on the Plaintiff is an illegal agreement in direct violation of the Anti-Trust laws of the State of Texas for the following reasons:

1. Such agreement would create an illegal Trust between Plaintiff and Defendant as defined in Vernon's Texas Codes Annotated, Business and Commerce Code, Section 15.02(b), for the reason that such agreement would r e s t r i c t trade, commerce and free pursuit of a lawful business, insofar as the Plaintiff's right to contract or do business with firms or companies which do not have a binding collective bargaining agreement with the Defendant.

2. Such agreement, if entered into, would create an illegal conspiracy in restraint of trade between Plaintiff and Defendant as explicitly prohibited by Section 15.03 of the

Texas Business and Commerce Code, for the reason that such agreement, as proposed by Defendant to the Plaintiff, would prohibit Plaintiff with dealing with, or doing business with third parties who did not have a binding collective bargaining agreement with the Defendant Union.

3. An agreement in the form that Defendant is attempting to force on the Plaintiff is illegal, as stated in Section 15.04 of the Texas Business and Commerce Code.

X.

That the Agreement which Defendant is attempting to force on the Plaintiff would cause the Plaintiff to subcontract work only to firms or companies who have an agreement with the Defendant; thereby making the Plaintiff a party to an agreement which could be relied on to deny employment to persons who are not members of the Defendant Union, in violation of the Texas Right To Work Law, Article 5207(a) V.A.C.S.

XI.

That, in addition to being in violation of the laws of the State of Texas, as alleged above, Plaintiff alleges that such Agreement would be violative of the laws of the United States for the reason that the contract which Defendant seeks to force upon the Plaintiff would violate Sections 1 and 2 of the Sherman Anti-Trust Act, 15 USCA § 1 and § 2.

XII.

That Plaintiff petitions this Court for Declaratory Judgment that the proposed contract which Defendant attempted to force on it through the picketing of its construction projects is illegal, being in violation of the Anti-Trust laws of the State of Texas and in violation of the Sherman Anti-Trust Act, and that all efforts, whether by picketing, coercion, economic pressure, or other means, to obtain such Agreement or one similar thereto, are also illegal, and Plaintiff further prays that the Court issue a Permanent Injunction and such other Orders as are necessary in the premises, enjoining and restraining Defendant from picketing, or attempting in any other manner, to force the Plaintiff to sign such Agreement as the one complained of herein, or any Agreement containing similar terms.

XIII.

In answer to the counter-claim of the Defendant contained in Paragraph 14 of Defendant's Original Answer, Plaintiff denies the allegations contained in such paragraph.

WHEREFORE, PREMISES CONSIDERED, Plaintiff, CONNELL CONSTRUCTION COMPANY, prays that, upon the trial of this case, this Court enter its Declaratory Judgment holding that the contract which Defendant has attempted to force upon it and all efforts to obtain such contract are illegal, being in violation

of the Anti-Trust Statutes of the State of Texas and of the United States, and Plaintiff further prays that the Court, pursuant to 15 USCA §4, enter its Order permanently enjoining the Defendant, its agents and members, from attempting in any manner to force the Plaintiff to enter into the contract complained of herein and Plaintiff further prays that it recover its costs herein expended and for such other and further relief, at law and in equity, special and general, to which it may show itself justly entitled.

Respectfully submitted,

SMITH, SMITH, DUNLAP & CANTERBURY
(Signed) JOE F. CANTERBURY, JR.
JOE F. CANTERBURY, JR.

THE STATE OF TEXAS)
COUNTY OF DALLAS)

BEFORE ME, the undersigned authority, a Notary Public in and for said County and State, on this day personally appeared JOE F. CANTERBURY, JR., known to me to be the person whose name is subscribed to the foregoing instrument, who, being by me first duly sworn, on his oath states that he is the attorney for CONNELL CONSTRUCTION COMPANY, INC. in the Cause No. CA-3-4455-B, CONNELL CONSTRUCTION COMPANY, INC. vs. PLUMBERS AND STEAMFITTERS LOCAL NO. 100, in the United States District Court for the Northern District of Texas, and that he is familiar with the contents of the foregoing Amended Complaint and Answer to Counterclaim and that every

statement and allegation of fact therein contained is true and correct.

(Signed) JOE F. CANTERBURY, JR.
JOE F. CANTERBURY, JR.,
Affiant

SUBSCRIBED AND SWORN TO before me by the said JOE F. CANTERBURY, JR. at Dallas, Texas, this 27th day of May, 1971, to certify which witness my hand and seal of office.

(Signed) TERESA DILLARD
Notary Public in and for
Dallas County, Texas

(SEAL)

EXHIBITS A, B & C omitted — Already printed on pages 12-16 of the printed Appendix.

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[12] FINDINGS OF FACT AND CONCLUSIONS OF LAW

(Number and Title Omitted)

Filed: Nov. 9, 1971

This suit was filed in the 134th Judicial District Court of Texas by Connell Construction Company, Inc., v. Plumbers & Steamfitters Local Union No. 100 of the United Association of Journeymen and Apprentices of the Plumbing and Pipefitters Industry of the United

States and Canada, AFL-CIO. Plaintiff sought injunctive relief against picketing and a declaratory judgment that the efforts of defendant to obtain a certain contract were illegal. The Defendant filed a petition for removal to this Court, to which petition Plaintiff responded with a motion to remand. This Court denied Plaintiff's motion to remand.

In an amended complaint, Plaintiff alleges that the contract which Defendant seeks to have Plaintiff sign is illegal contending that it violates the Anti-Trust laws of Texas, the Texas Right to Work Law and the Sherman Anti-Trust Act. Plaintiff seeks a permanent injunction against the Defendant from picketing for the purpose of obtaining the contract and for a declaratory judgment that the proposed contract is illegal. Defendant contends the proposed contract is not illegal, being made lawful by Section 8(e) of the Labor-Management Relations Act. Defendant has filed a counter-claim in which it has asked for a declaratory judgment that the contract in question has been authorized by Congress and does not violate any state or federal laws.

Findings of Fact

1. Plaintiff is a Texas Corporation engaged in the building construction business with its principal office located in Dallas County, Texas. It is engaged in interstate commerce, or in a business affecting interstate commerce.

2. Defendant is an unincorporated association, and a labor organization as that term is defined in the Na-

tional Labor Relations Act and other federal statutes governing labor management relations.

3. Plaintiff does not, and has not, employed plumbers and steamfitters, and at all times material to this case Plaintiff has had no employees who are members of, or who are represented by Defendant.

4. Although, on occasion, an owner may choose to include the mechanical installation of a project in Plaintiff's contract, it is customary for Plaintiff to include the mechanical installations as a portion of its total contract, which mechanical work Plaintiff uniformly subcontracts to other companies or firms.

5. On November 25, 1970, A. B. (Pat) Patterson, representative of Defendant, forwarded to Plaintiff a proposed contract which stated as its purpose:

> "Whereas, the contractor and the union desire to make an agreement applying in the event of subcontracting in accordance with Section 8(e) of the Labor Management Relations Act."

The last paragraph of the proposed contract read as follows:

> "Therefore, the contractor and the union mutually agree with respect to work falling within the scope of this agreement that is to be done at the site of construction, alteration, painting or repair of any building, structure, or other works, that is the contractor should contract or subcontract any of the aforesaid work falling within the normal trade jurisdiction of the

> union, said contractor shall contract or subcontract such work only to firms that are parties to an executed, current collective bargaining agreement with Local Union 100 of the United Association of Journeymen and Apprentices of the Plumbing and Pipe fitting Industry." (sic).

6. The letter accompanying the proposed contract stated that "the contract was drafted to conform to the provisions of Section 8(e) of the Labor Relations Act." Said letter and proposed contract were received by Plaintiff on December 3, 1970.

7. In the past Plaintiff has subcontracted the mechanical installation of its construction projects to some firms which do not have a Collective Bargaining Agreement with Defendant as well as some firms which do have such an agreement with Defendant.

8. On or about January 15, 1971, Defendant, not having heard from Plaintiff, picketed a construction site of Plaintiff located at 8700 Stemmons Freeway, Dallas, Texas, where Plaintiff was constructing a multi-story office building. Such picketing was conducted by a single picket and was not attended by any violence.

9. The sign carried by a member of Defendant read as follows:

> "Connell Construction Co.
> Gen. Cont.
> Does not have a
> Subcontract with

U.A.P.P. Local 100
We are picketing the
Above employer only."

10. Defendant's picketing of Plaintiff's jobsite was for the purpose of obtaining Plaintiff's signature to the contract form set out above and which was introduced as Px 3.

11. When Defendant's picket appeared at Plaintiff's job site some of the employees of Plaintiff and of its sub-contractors left the job site and refused to work.

12. For a period in excess of ten years Plaintiff has on occasion subcontracted mechanical work to a firm known as Texas Distributors, with which Defendant has no Collective Bargaining Agreement.

13. Defendant has picketed other general contractors in the Dallas area and an agreement similar to the one involved herein has been obtained from some of these contractors.

14. The picket placed by Defendant on Plaintiff's job site remained from the 15th of January, 1971 until the 21st of January, 1971, when such picketing was restrained by the Judge of the 134th District Court of Dallas County, Texas.

15. On March 28, 1971, Plaintiff and Defendant signed a contract containing a provision "that if Contractor should contract or subcontract any of the aforesaid work falling within the normal trade jurisdiction of Union, said Contractor shall contract or subcontract

such work only to firms that the parties to an executed current collective bargaining agreement with Local Union 100. . ."

16. The contract signed by the parties also provided "that Contractor — has entered into this agreement under protest and that said Contractor has instituted proceedings to test the legality of this Agreement."

17. Thereafter Plaintiff lost two jobs in which the successful Contractor contracted with Texas Distributors, a non union company, to perform the mechanical work.

18. At the time Defendant sent the contract in question to Plaintiff, Defendant had agreements with some 75 contractors in the Dallas area.

19. Defendant sent a similar contract to the one involved in this case to K.A.S. Construction Company in Richardson, Texas, and picketed the company. K.A.S. refused to sign the proposed agreement and made a complaint to the Regional National Labor Relations Board in Fort Worth, Texas. NLRB refused to issue a complaint and appeal was filed with the General Counsel of the NLRB in Washington. On August 30, 1970, the appeal was denied by the General Counsel.

Conclusions of Law

1. Section 8(e) of the Labor Management Act being directly involved in the allegations of Plaintiff's complaint the motion to remand was properly denied.

2. Plaintiff seeks to invalidate a contract which Defendant contends was drafted to conform to the provisions of Section 8(e) of the Labor Management Act. The legality of the proposed contract under Section 8(e) is a federal question giving this Court jurisdiction.

3. The subcontractor clause is authorized and protected by the proviso of Section 8(e) of the National Labor Relations Act. *Construction Laborers Local 383 v. NLRB*, 323 F2d 433 (9th circ. 1963).

4. The contract being protected by the proviso to Section 8(e) of the Act picketing to secure it is not unlawful. 323 F2d 422 (9th Circ. 1963). *Orange Belt District Council of Painters v. NLRB*, 328 F2d 534 (D.C. Circ. 1964); *Los Angeles Building & Construction Trade Council*, 183 NLRB No. 102 (1970).

5. The legislative history of Section 8(e) clearly shows the intent of Congress. The Norris-La Guardia Act enacted in 1932 "established that the allowable area of union activity was not to be restricted — to an immediate employer-employee relation." *U. S. v. Hutcheson*, 312 U.S. 219, 231. Section 13(c) of the Norris-La Guardia Act provided that the term labor dispute and thus the scope of immunity "includes any controversy concerning terms or conditions of employment — *regardless of whether or not the disputants stand in the proximate relation of employer and employee.*" 47 Stat. 73 (Emphasis added).

Labor abuses of this broad immunity resulted in the Taft-Hartley Act prohibitions against secondary activi-

ties contained in Section 8(b) (4)(A) which as amended in 1959 is now Section 8(b)(4)(B). The Landrum-Griffin Act of 1959 did not expand Section 8(b)(4)(A). Section 8(e) in Landrum-Griffin was clearly a compromise. It does not expand the type of conduct condemned by Section 8(b)(4)(B), but in the proviso it exempts the construction industry from such prohibitions, indicating an intention by Congress to return to the broad provisions of Norris-La Guardia to enlarge the scope of immunity, "regardless of whether the disputants stand in the proximate relation of employer and employee." *Woodwork Manufacturer v. NLRB*, 386 U.S. 612 (1967).

6. Labor legislation is "to a marked degree, the result of a conflict and compromise between strong contending forces and deeply held views on the role of organized labor in the free economic life of the Nation and the appropriate balance to be struck between the uncontrolled power of management and labor to further their respective interests." *Local 1976, United Brotherhood of Carpenters v. Labor Board*, 357 U.S. 93, 99-100. The proviso of Section 8(e) is clearly the result of conflict and compromise and was "added to preserve the status quo in the construction industry and exempt the garment industry from the prohibitions of Sec 8(e) and 8(b)(4)(B)" *Woodwork Manufacturers v. NLRB, supra.*

7. The agreement in question being authorized by Congress such a contract does not violate Federal Anti-Trust statutes. *Suburban Tile v. Rockford Building Trades Council*, 354 F2d 1 (7th Cir. 1965).

8. The states are not free to regulate conduct which is the subject of federal regulation and the contract in question does not violate Texas Anti-Trust laws or the Texas Right to Work Law.

9. The Plaintiff, Connell Construction Company, Inc., is not entitled to an order enjoining Defendant, its agents and members from picketing to obtain the contract in question.

10. The contract in question is found to be legal and in conformity with Section 8(e), 29 U.S.C. Section 158(e).

(Signed) SARAH T. HUGHES
United States District Judge

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[13]

JUDGMENT

Filed: Nov. 18, 1971

In the United States District Court
For the Northern District of Texas
Dallas Division

Connell Construction Company, Inc.

versus

Civil Action
No. CA 3-4455-B

Plumbers and Steamfitters Local Union No. 100 of the United Association of Journeymen and Apprentices of the Plumbing and Pipefitters Industry of the United States and Canada, AFL-CIO

This action came on for trial on the merits before the Honorable Sarah T. Hughes, United States District Judge, on the 12th day of October, 1971, and the Court having heard and considered the evidence and stipulations of the parties and duly considered the briefs and arguments of counsel, and all the issues herein having been duly tried, and the Court having jurisdiction of this cause, therefore, in accordance with the findings of fact and conclusions of law heretofore signed and entered by the Court, it is

ORDERED, ADJUDGED, DECREED and DECLARED:

(1) that the declaratory and injunctive relief sought by the Plaintiff be denied and Plaintiff take nothing by its action;

(2) the Defendant is granted declaratory relief pursuant to the provisions of 28 U.S.C., Section 2201 and the contract in question is declared to be legal and in conformity with Section 8(e) of the Labor Management Relations Act as amended and further said contract is declared not to be in violation of either the Texas anti-trust laws of the Texas right-to-work law;

(3) the Defendant shall recover of the Plaintiff its costs of action;

(4) To all of which action, Plaintiff excepted.

Signed and entered this 16th day of December, 1971.

(Signed) SARAH T. HUGHES
Sarah T. Hughes
United States District Judge

APPROVED AS TO FORM:

(Signed) DAVID R. RICHARDS
David R. Richards
CLINTON & RICHARDS
600 West 7th
Austin, Texas 78701
ATTORNEYS FOR DEFENDANT

(Signed) JOE F. CANTERBURY, JR.
Joe F. Canterbury, Jr.
SMITH, SMITH, DUNLAP & CANTERBURY
40th Floor First National Bank Bldg.
Dallas, Texas 75202
ATTORNEYS FOR PLAINTIFF

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[16] ORDER

(Number and Title Omitted)

Filed: Dec. 17, 1971

Came on to be considered the Plaintiff's Motion for New Trial and Motion for Amended and Supplemental Findings of Fact and Conclusions of Law, and the Court having duly considered all such motions and requests, and being of the opinion that same should be denied in all respects; it is therefore

ORDERED, ADJUDGED and DECREED that the Plaintiff's Motion for New Trial and Motion for Amended and Supplemental Findings of Fact and Conclusions of Law are hereby in all respects denied, to which action Plaintiff noted its exception.

Signed and entered this 1 day of December, 1971.

(Signed) SARAH T. HUGHES
Sarah T. Hughes
United States District Judge
Northern District of Texas

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[17] NOTICE OF APPEAL

Filed: Jan. 4, 1972

In the United States District Court for the
Northern District of Texas
Dallas Division

Connell Construction Company, Inc.

Civil Action
versus No. CA 3-4455-B

Plumbers and Steamfitters Local Union No. 100 of the United Association of Journeymen and Apprentices of the Plumbing and Pipefitters Industry of the United States and Canada AFL-CIO

Notice is hereby given that CONNELL CONSTRUC-

TION COMPANY, INC., Plaintiff above named, hereby appeals to the United States Court of Appeals for the Fifth Circuit from the final judgment entered in this action on the 18th day of November, 1971.

SMITH, SMITH, DUNLAP & CANTERBURY
(Signed) JOSEPH F. CANTERBURY, JR.
JOSEPH F. CANTERBURY, JR.
4050 First National Bank Building
Dallas, Texas 75202 — 748-7051
Attorneys for Plaintiff

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[19] TRANSCRIPT OF PROCEEDINGS

(Number and Title Omitted)

Filed: Jan. 28, 1972

[1] REPORT OF PROCEEDINGS had on the 12th day of October, 1971, before the Honorable Sarah T. Hughes, U. S. District Judge, at Dallas, Texas, and without a jury, in the above styled and numbered cause.

APPEARANCES: Mr. Joseph Canterbury, For the Plaintiff; Mr. David Richards, For the Defendants

[3] THE COURT:
For the record, will you give the full names to the Court Reporter, please?

MR. CANTERBURY:
Joe Canterbury, Connell Construction Company, for the plaintiff, 4050 First National Bank Building.

MR. RICHARDS:
David Richards, 600 West Seventh, Austin, Texas, for the defendant, Plumbers Local.

MR. KELLER:
If the Court please, we have been in these proceedings as amicus, and I guess it is proper for me to give my name to the Court Reporter.

THE COURT:
In what way are you going to participate?

MR. KELLER:
I'm not going to participate, other than to make an argument, or a few statements as amicus, if possible.
We had had a motion which had been granted, where we received notification of all settings in these proceedings — except this hearing. We were not advised until yesterday afternoon that this case would be tried today. We would like to have an opportunity to file a short brief within the next two or three days, with the permission of the Court. We make [4] that request for the reason that we did not, as I have stated, know that these proceedings were set today.

THE COURT:
Will you state your name?

MR. KELLER:
William L. Keller, 2424 First National Bank, Dallas, Texas.

THE COURT:
All right, Mr. Canterbury, will you state your allegations briefly.

MR. CANTERBURY:

May it please the Court, Your Honor, this case involves the attempt of Plumbers and Steamfitters Union Local 100 to force, by picketing and economic coercion, Connell Construction Company to enter into a contract, whereby Connell Construction Company, who is the general contractor, would agree that it would no longer do business with any plumber or mechanical firm which did not have a contract with Local 100.

It is our position, Your Honor, that this type of agreement violates the Antitrust Laws of the State of Texas, the Federal Antitrust Laws, in that the Union in this case has attempted to get an employer, Connell Construction Company, to assist it in achieving goals over other employees over which Connell has no control; Connell Construction Company has no employees who are members of the Union involved in this case, its employees are members of various [5] unions that Connell Construction Company hires.

We petition the Court, and will show the Court through stipulations and some short evidence that the agreement on its face, which they have picketed Connell for does violate the Antitrust laws and we will petition for a Declaratory Judgment so holding, and also for an injunction enjoining further picketing, in violation of the Antitrust Law.

Thank you, Your Honor.

THE COURT:

Mr. Richards.

MR. RICHARDS:

Very briefly, Your Honor, we think that this is a mat-

ter that is governed exclusively by the National Labor Relations Act. This is a contract that is specifically authorized by a provision of the National Labor Relations Act, Section 8 E, and the National Labor Relations Board has so held. It was an agreement that was specifically contemplated by Congress, when, in 1959, they enacted the Amendments to this law. And our brief contains references as to statements in the Congressional Record, both by Senators Kennedy and Goldwater to just this effect.

The agreement having been authorized by Congress in the National Labor Relations Act, we say it simply makes no sense to say that it would be a violation of either State Antitrust Laws, or Federal [6] Antitrust law. And we have cited cases to Your Honor, one from the Fifth Circuit, the case that I was involved in which is specifically in point, and another from the Ninth Circuit, and numerous NLRB decisions holding this particular contract and picketing to obtain such a contract be lawful activity under the National Labor Relations Act.

That is our position. We think that we are entitled to a Declaratory Judgment that the contract is entirely lawful.

THE COURT:

Mr. Keller, do you wish to say anything?

MR. KELLER:

Our motion to intervene was filed on behalf of Associated General Contractors, which is an association comprised of contractors. Mr. Connell is a member of that association, as are other contractors who have

been picketed by this union for similar types of sub-contract agreements.

We agree with the position of the plaintiff, that the conduct in question, and the type of agreement that they have demanded, does contravene the State Anti-trust Laws and the Federal Antitrust Laws, primarily for the reason that, number one, it seeks to impose conditions outside of what is traditionally recognized as the employer-employee relationship.

[7] Mr. Connell in this case did not hire members of this union, did not have a contract with this union; there would be no basis for this contract between Mr. Connell and this union.

THE COURT:

Will the witnesses who are present please stand up and be sworn?

(Witnesses sworn)

MR. CANTERBURY:

May it please the Court, and prior to calling our first witness, we have some agreed stipulations of fact which we would like to enter as Plaintiff's Exhibit Number One, Your Honor. They have been signed by counsel for both parties.

(Plaintiff's Exhibit No. 1 marked for identification.)

MR. RICHARDS:

I think there are some attachments that are supposed to accompany the petition. Are they attached?

MR. CANTERBURY:

No. I will introduce into evidence the two attach-

ments that we have been talking about.

The plaintiff calls Mr. George Connell.

GEORGE CONNELL,

having been duly sworn to tell the truth, the whole truth and nothing but the truth, testified as follows:

[8] DIRECT EXAMINATION

BY MR. CANTERBURY:

Q Would you state your name and address for the Court, please.

A George T. Connell, 3524 Bryn Mawr.

Q Mr. Connell, what is your position with Connell Construction Company?

A I am owner, and Chairman of the Board.

Q How long has Connell Construction Company been in business, Mr. Connell?

A 24 years.

Q And what is the nature of the business of Connell Construction Company?

A The construction of commercial industrial manufacturing buildings.

Q Commonly known as is what is a general contractor?

A General building contractor.

Q Mr. Connell, how do you obtain construction jobs and prospects?

A By competitive bidding, and by negotiations.

Q In submitting bids through negotiations, or through competitive bidding, do you obtain bids from various mechanical and plumbing sub-contractors [9] for the mechanical portion of the work?

A Yes, I do.

Q How do you select the mechanical contractor, assuming you are the successful general contractor?

A You mean the one that we award the contract to?

Q Yes. Assuming you are successful, how do you choose your mechanical sub-contractor?

A By the low responsible bidder.

Q Do you require your mechanical sub-contractor to hire only union, or non union personnel?

A No.

Q Do you make any requirements of your sub-contractors concerning their labor policy?

A No.

Q Do you hire any plumbers?

A No.

Q Mr. Connell, over the past 24 years, has Connell Construction Company done business on a regular basis with various mechanical sub-contractors, both union and non union?

A Yes.

Q Could you name some for the Court with which you have a continuing relationship?

[10] A My memory is not that good. But I have a few notes here.

Q Do you have some notes you could use to refresh your memory?

A Yes. I have a list of the last 24 mechanical and plumbing contractors with which we have done business.

Q Out of that list of 24 how many, if you know, are open shop, or non-union mechanical sub-contractors?

A I believe that there is 12 open shops, and 12 non-union. One of them I'm not sure of — I don't know what his labor policy is.

Q Would you list the open shop ones for the Court, please?

A American Air Conditioning, Avery Air Conditioning, Brandt Engineering, Burnett Services, Dallas Heating and Air Conditioning, Frymire Engineering, Harrington Brothers, T. B. Levy and Son Plumbing Company, Phillips and Shaw Plumbing Company, Spencer Air Conditioning, and Texas Distributors, Incorporated.

Q These 12 companies you just named, have you done more than one job with these companies?

A For the most part, yes.

Q And in your opinion as a general contractor, [11] have they been responsible sub-contractors, and qualified?

A In each case, yes.

Q Mr. Connell, does Connell Construction Company have collective bargaining agreements with various unions covering your employees?

A Yes, we do.

Q Which crafts do you have collective bargaining agreements with, which unions?

A We have the carpenters, cement finishers, iron workers, hoisting engineers, and I believe the bricklayers.

Q Common laborers?

A Common laborers, yes.

Q Of those classifications of crafts you just named, do you employ people directly in your employ?

A Yes.

Q Mr. Connell, would it injure your competitive bidding procedures if you could not use the 12 companies you just named?

A Absolutely.

MR. RICHARDS:

We will object, and move to strike as conclusionary, Your Honor.

THE COURT:

I sustain the objection.

[12] He may be more specific, if he wants.

Q (By Mr. Canterbury) Mr. Connell, if you were in your competitive bidding processes when you obtain a bid for mechanical portions of the job, do you solicit competitive bids?

A Yes.

Q Without regard to the labor policies of the company from whom you solicit these bids?

A Yes.

Q If 12 of the companies which you have named, you could no longer use, would this reduce the competition from which you benefit?

A Yes.

Q Would this, in turn, injure your competitive portion on your bidding process to an owner?

A Yes.

MR. RICHARDS:

The same objection, Your Honor.

THE COURT:

I will overrule the objection.

Q (By Mr. Canterbury) Mr. Connell, would you like to continue doing business with the companies you have just named?

A Yes.

MR. CANTERBURY:

I will pass the witness, Your Honor.

[13] CROSS EXAMINATION

BY MR. RICHARDS:

Q Mr. Connell — is that correct?

A That's correct.

Q Does the list include, that you have before you, the 12 union contractors that you have done business with?

A Yes, it does.

Q Why don't you give us, for the record, if you would.

A Would you like me to read them?

Q If you would, please, sir.

A Beard Plumbing Company, Burden Brothers, Cohn-Daniel, Continental Mechanical, Dallas Air Conditioning, The Farwell Corporation, General Mechanical, Kieffer Plumbing and Heating, W. H. Kuhn and Sons, the Natkin Company, C. Wallace Industries, and Sam P. Wallace Company.

Q Are most of those local contractors, that is, Dallas area contractors?

A Yes, sir.

Q And would you say about them, as you did about the non-union contractors that you listed, that they are responsible mechanical contractors?

A Yes, sir.

[14] Q And so we are clear, if I understand the typical practice, you, as a general contractor, submit a bid to the owner for an over-all construction project and that over-all price would include various aspects that you will ultimately sub-contract out; is that true?

A Yes.

Q And among those is, typically, the mechanically contracting portion; is that correct?

A Yes.

Q And others are electrical, I suppose — is that correct?

A Yes.

Q — elevator, perhaps, or — what are the others?

A All components that make up a job.

Q And if I understand the practice to be — strike that.

As I understand the practice to be, once you have been successful in securing the award of the general contract, you then would, in turn, award those components which you intend to sub-contract out; is that correct?

A That's correct.

Q And it is customary in the industry for [15] the mechanical contracting portion to be uniformly sub-contracted; is that correct?

A Yes.

Q And mechanical, so we understand it, in layman's terms, is essentially what? Plumbing, heating, and air conditioning?

A Plumbing, heating, ventilating, and air conditioning, right.

MR. RICHARDS:

That's all the questions that I have. Thank you.

REDIRECT EXAMINATION

BY MR. CANTERBURY:

Q Mr. Connell, is it a common and usual practice for an architect on a construction project to specify the names of acceptable mechanical and electrical contractors?

A It is a common practice.

Q Has your company bid on any jobs recently where both union and open shop mechanical firms have been specified?

A Yes.

MR. CANTERBURY:

That's all the questions that I have, Your Honor.

MR. RICHARDS:

No further questions.

THE COURT:

You may step down, Mr. Connell.

[16] MR. CANTERBURY:

The plaintiff will call Mr. Tommy Stewart.

THOMAS STEWART,

having been duly sworn to tell the truth, the whole truth and nothing but the truth, testified as follows:

BY MR. CANTERBURY:

Q State your name and address for the Court, please.

A Thomas Hanger Stewart, 4018 Deep Valley Drive, Dallas.

Q How are you employed, Mr. Stewart?

A With Connell Construction Company, as President.

Q How long have you been with Connell Construction Company?

A Approximately six years.

Q And how long have you been President?

A Approximately a year and a half.

Q Mr. Stewart, do you prepare bids on construction projects?

A Yes, I help in the preparation.

THE COURT:

Will you lean a little closer to that loudspeaker, if you will.

Q (By Mr. Canterbury) You heard Mr. Connell [17] testifying. When you prepare bids, do you also solicit competitive bids from mechanical sub-contractors?

A Yes.

Q Both union, and open shop?

A Yes.

MR. CANTERBURY:

Mark this, please.

(Plaintiff's Exhibits Nos. 2 and 3 marked for identification.)

Q (By Mr. Canterbury) Mr. Stewart, I hand you what has been marked as Plaintiff's Exhibit No. 2 and Plaintiff's Exhibit No. 3. I ask you if you can identify these exhibits?

A Yes, I believe I can.

Q What is Plaintiff's Exhibit No. 2?

MR. RICHARDS:

I'm sure we can stipulate to it, Counsel, if you would rather, if it is quicker.

MR. CANTERBURY:

Yes, that is all right.

For the record, Plaintiff's Exhibit 2 is a letter addressed to Connell Construction Company, dated November 25, 1970, such letter being sent by Local 100, and signed by Mr. Pat Patterson, as Business Agent.

Plaintiff's Exhibit No. 3 is a proposed contract which was attached and received with Plaintiff's [18] Exhibit 2, by the plaintiff.

We offer Plaintiff's Exhibits 2 and 3 into evidence.

MR. RICHARDS:

No objection. As I understand it, they are also referred to in our stipulation.

MR. CANTERBURY:

Yes.

MR. RICHARDS:

No objection.

THE COURT:

They may be admitted.

Q (By Mr. Canterbury) Mr. Stewart, after you — did you receive Plaintiff's Exhibit No. 2, being the letter which we have referred to?

A Yes, I did.

Q Did you receive, along with it, the attached contract?

A Yes.

Q Did you sign that contract?

A Yes.

Q Plaintiff's Exhibit No. 3? Let me show it to you.

A Okay.

Q Take a look at it, Mr. Stewart.

MR. RICHARDS:

Counsel, we will stipulate that he did not sign the contract at that time; he sent us back a letter — if that will move it along the line.

[19] MR. CANTERBURY:

I was going to suggest we could go home, Your Honor.

THE WITNESS:

No, Your Honor, this one I didn't, no. I received it in the mail.

Q (By Mr. Canterbury) Mr. Stewart, it has been stipulated in this case that Local 100 picketed a construction project of Connell, known as the Bruton Ventures project.

Did you see the picketing being conducted at the construction project on Stemmons Freeway?

A Yes, I did.

Q Do you recall how long the picketing lasted?

A Several days. I don't remember the exact time.

Q When the picketing started, Mr. Stewart, do you know how many employees, either employees of Connell Construction Company, or other sub-contractors, left the job?

A Approximately 150, I believe it was, were put out of work.

Q And it has further been stipulated that the picketing was to obtain your signature, or the signature of Connell Construction Company, on the agreement which has been introduced in evidence as [20] Plaintiff's Exhibit 3?

A Yes, it was.

Q Now, did you make any progress while the picketing was going on, on the construction project?

A No, we didn't.

Q Did your employees refuse to work while the picketing was going on?

A Yes, they did.

Q Would employees of the various other crafts of which you had sub-contracted work, would they work on the project?

A Most of them refused to cross the picket line and work.

Q Who was your mechanical sub-contractor on this project?

A Dallas Air Conditioning.

Q To your knowledge, is Dallas Air Conditioning a union contractor?

A Union, yes, I believe so.

Q And has a contract with Local 100?

A Yes.

Q Mr. Stewart, after we filed this lawsuit in State Court, and we wound up in Federal Court, did you subsequently enter into an agreement with Local 100?
[21] A Yes.

MR. CANTERBURY:
Mark this, please.
(Plaintiff's Exhibit No. 4 marked for identification.)
Q (By Mr. Canterbury) I hand you Plaintiff's Exhibit No. 4, and ask you if this is the agreement that you entered into in March of 1971?
A Yes, it is.

MR. RICHARDS:
No objection.

MR. CANTERBURY:
Your Honor, for the record, I would like to paraphrase this short agreement entered into between Local 100, and Connell in March of 1971.
The agreement is basically the same agreement which the union picketed for and which this lawsuit is over, that Connell not subcontract any work to any firm that does not have a collective bargaining agreement with Local 100. It does contain a provision that Connell has entered into this agreement under protest and has instituted legal proceedings to test the validity of it.
Q (By Mr. Canterbury) Mr. Stewart, did you enter into the contract which has been marked as Plaintiff's Exhibit No. 4?
A Well, we entered into it under protest.

[22] Q Did you enter into it?

MR. RICHARDS:
I will object to going into why he entered into the contract. I think we can both tell Judge Hughes that this is not a trumped-up lawsuit, if that is what you are worried about.

MR. CANTERBURY:
Do you want to stipulate that he entered into the contract on threat of further picketing, to avoid further picketing?

MR. RICHARDS:
I will stipulate that he will so testify.
Q (By Mr. Canterbury) Do you so testify, Mr. Stewart?
A Yes.
Q Mr. Stewart, after you entered into the contract marked as Plaintiff's Exhibit No. 4, did you attempt to use any non-union mechanical sub-contractors after that time?
A No, we did not.
Q Did you bid on any construction projects after that time?
A Yes, we have.
Q Did you bid on any projects where the architect specified the names of qualified mechanical subcontractors?
A Yes.

[23] MR. CANTERBURY:
Mark this.

(Plaintiff's Exhibits Nos. 5 and 6 marked for identification.)

Q (By Mr. Canterbury) Mr. Stewart, I hand you what has been marked as Plaintiff's Exhibit 5 and ask you if you can identify that instrument?

A Yes. It is a list of approved mechanical sub-contractors on a project we bid, the First National Bank in Garland, Texas.

Q And on Plaintiff's Exhibit 6, can you identify that instrument?

A It, too, is an approved sub-contractor list from architects on the Temple Shalom project in Dallas.

Q This was the Garland National Bank and the Temple Shalom jobs?

A Yes.

Q Did both of these lists list Texas Distributors as an approved sub-contractor?

A I believe, yes.

MR. RICHARDS:

We are going to object to this in terms of materiality. We accept the authenticity of the document. These are events that have transpired that are outside the scope of the pleadings, and we see them as not relevant to the issues here.

[24] THE COURT:

I will overrule the objection.

MR. CANTERBURY:

Your Honor, we offer Plaintiff's Exhibits 5 and 6 into evidence.

THE COURT:

They may be admitted.

Q (By Mr. Canterbury) Mr. Stewart, looking at Plaintiff's Exhibit No. 5 you say that is a list of approved sub-contractors on which project?

A The First National Bank in Garland.

Q How many sub-contractors — we are talking about mechanical sub-contractors only. How many are listed?

A 19.

Q From reviewing that list, if you will, can you tell me how many of them are open shop?

A To the best of my knowledge, approximately eight.

Q Were you the successful bidder on that job?

A No, we were not.

Q How did you come out?

A We were second.

Q Who got the job, if you recall?

A John Rock Construction Company.

Q Do you recall which mechanical firm had the most competitive price for the plumbing and [25] mechanical work on that project?

A Texas Distributors.

Q In view of this contract, you did not use Texas Distributors' bid when you turned in your price, did you?

A No, we didn't.

Q Who is doing the mechanical work on that project?

A Texas Distributors.

Q How much lower was Texas Distributor's bid than the nearest union bid on the project?

A I don't know the exact amount. It was over $10,000.

Q All right, on the Temple Shalom job, how did you come out on that one?

A I believe we were third or fourth bidder.

Q All right. If you would look at the list there, how many sub-contractors were approved for mechanical and plumbing work?

A Eight.

Q How many of them were open shop?

A Four.

Q Which firm turned in the most competitive price for the plumbing and electrical portions of the Temple Shalom job?

[26] A Texas Distributors.

Q And, of course, again you were not able to use their price?

A Correct.

Q Who got the project for the general contractor?

A Ground Engineering Company.

Q Do you know whether or not Ground Engineering Company used Texas Distributors?

A Yes, they did.

Q Have you bid on any other construction projects other than the two we have mentioned here, since March, where you have not been able to use any open shop mechanical bids?

A Yes, we have bid on several jobs, and cannot use them.

Q Were their prices — do you recall the names of any jobs?

A Not offhand, no.

Q Mr. Stewart, were you directly responsible for

preparing the bids of the Temple Shalom job, and the Garland National Bank job?

A I review all bids before they are turned in, yes.

Q Do you make the final review of the bids?

[27] A Yes, along with the estimators.

Q Has your inability, since March, to receive competitive prices from all of the companies which Mr. Connell named, has this injured your possibilities and hurt you in getting construction work?

A Yes, definitely.

Q And jobs for your employees?

A Definitely.

Q I notice on these two projects, Temple Shalom, and the Garland — First National Bank building in Garland, Mr. Stewart, that the architects specified qualified or acceptable mechanical sub-contractors.

Of the projects you bid, what percent would you estimate that the architect specifies which sub-contractor you can use for your mechanical work?

A It is about approximately 50 to 60 percent have been — have had a specified list from the architect.

Q And when you receive your specifications on most projects are both open shop and union mechanical firms listed as approved sub-contractors?

A Yes.

Q Are there any instances where an owner may specify only one mechanical contractor that he will approve on a project?

[28] A Yes, there are. I'm sure there is.

Q Have you ever been on a project where the owner specified only an open shop firm, mechanical firm for doing the mechanical work?

A I have not bid on one, no.

Q Mr. Stewart, of the firms with which Connell Con-

struction Company does mechanical work on a continuing basis, which of the open shop firms would you say that you do the most work with?

A Texas Distributors.

Q How long —

A As far as non-union goes.

Q How long has Connell Construction Company been doing business on a regular basis with Texas Distributors?

A Since I have been employed with them. Long before that, too, to my knowledge.

Q And you know before that time, too?

A Yes.

Q Mr. Stewart, in your capacity as President of Connell Construction Company, do you attempt — prior to entering into this agreement, have you attempted to specify the labor policy of your subcontractors?

A No.

[29] MR. CANTERBURY:

I will pass the witness for now, Your Honor.

CROSS EXAMINATION

BY MR. RICHARDS:

Q Mr. Stewart, referring to Plaintiff's Exhibit No. 5, you indicated of the 19 approved mechanical contractors, eight were open shop. I assume the balance were union contractors; is that correct?

A To the best of my knowledge, yes.

Q Do you remember the approximate dollar volume of the mechanical contract on the bank job?

A No, I can't.

Q Do you remember how much you were beaten on the job by the guy who got the bid?

A Approximately $30,000, I believe, on the base bid.

Q Do you recall the taking of your deposition? Do you, Mr. Stewart?

A Yes.

Q I asked you at that time if you had any information whether Local 100 had reached some understanding, or entered into some conspiracy with mechanical contractors in the area to try to drive Texas Distributors, or anyone else, out of business. Do you recall me asking you that question?

[30] A Yes.

Q And what was your answer to it?

A Not to my knowledge, I believe.

Q You have no information concerning anything like that?

A No.

Q I asked you at the time of your deposition whether you had any information, direct or indirect, of the existence of a plan, or agreement between Local 100 and other contractors, whether they be general contractors, or mechanical contractors, whereby Local 100 will undertake to create a monopoly in the Dallas area for certain contractors.

Do you recall me asking that question?

A Yes.

Q And what was your answer if you recall?

A "Not to my knowledge."

Q And that is your testimony today?

A Yes.

MR. RICHARDS:

That's all that I have. Thank you.

THE COURT:
Is that all?

MR. CANTERBURY:
Your Honor, I have one more question.

[31] REDIRECT EXAMINATION

BY MR. CANTERBURY:
Q Local 100 has attempted to get Connell Construction Company, has it not Mr. Stewart, to agree not to do business with any firm not to their liking?
A Yes, they have.

MR. CANTERBURY:
That's all that I have. Thank you, Mr. Stewart.

THE COURT:
I think the contract speaks for itself.
(Witness excused)

MR. RICHARDS:
May we understand that the witness, when saying, "not to their liking," meant who were not union contractors? May we have that understanding, that that is the answer to the question?

MR. CANTERBURY:
Who are in not contractual relationship, on a current collective bargaining relationship with Local 100.

• • • •

[42] MR. CANTERBURY:
Your Honor, at this time plaintiff calls Mr. Pat Patterson, as an adverse witness.

MR. RICHARDS:
We will concede that he is qualified under 43-B as an adverse witness.
Is it 43-B?

PAT PATTERSON,
called as an adverse witness by the plaintiff, having been duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. CANTERBURY:
Q State your name and address for the record, please, sir.
A Pat Patterson, residence, 1465 Templecliff Drive, Dallas.
Q How are you employed, Mr. Patterson?
A Business Representative, Local Union 100, Plumbers and Steamfitters.
Q How long have you been a Business Representative for Local 100?
[43] A Eight years.
Q Mr. Patterson, the agreement which has been introduced into evidence, which you originally sent Connell Construction Company — do you have it up there? I believe so.
A I don't see it.
Q Plaintiff's Exhibit 3.

You are familiar with that agreement, aren't you, Mr. Patterson?

A Yes, I am.

Q Now in that agreement — did you write that agreement?

A Along with the attorney, Mr. Dave Richards. We drafted it.

Q In your agreement you state — if this is correct — that the contractor, whoever you sent it to, shall contract or sub-contract such work only to firms that are parties to an executed current collective bargaining agreement with Local 100; is that correct, sir?

A This is correct.

Q Now at the time that you first sent this agreement to Connell Construction Company, did you have — you did have an agreement, I assume, or Local 100, with various mechanical firms in the Dallas area?

[44] A Yes, sir.

THE COURT:

Answer out, please, sir.

THE WITNESS:

Yes, we had numerous agreements with mechanical contractors in the Dallas area, some 75, probably in number.

Q (By Mr. Canterbury) 75?

A Within the jurisdiction. The Dallas area — our jurisdiction embraces from here to Oklahoma, to Navarro County, east to Sulphur Springs, west to Tarrant County, so that is 75 within the jurisdiction.

(Plaintiff's Exhibit No. 5 marked for identification.)

Q (By Mr. Canterbury) Mr. Patterson, I hand you what has been marked as Plaintiff's Exhibit 5, and ask you if you can identify that instrument?

A Yes.

Q What is Plaintiff's Exhibit 5, sir?

A This is an expired agreement between Local Union 100, and Mechanical Contractors' Association of Dallas.

Q Is that the agreement that you had in force with mechanical contractors in the Dallas area at the time you sent the proposed contract which is the subject of this lawsuit to Connell Construction [45] Company?

A This is the agreement.

Q Is that the agreement you are referring to when you say in your agreement that: "Whoever the contractor may be shall not sub-contract work to anybody who doesn't have an agreement with Local 100"? Is that the one you are referring to?

A Yes, this is the one I refer to.

Q Do you have — would there be any other agreement?

A None other.

Q Well, could a — suppose a sub-contractor mechanical contractor, wanted to get a contract. At the time could they come in and get one on different terms?

MR. RICHARDS:

Excuse me. I object to that. Do you mean could they come in and execute this contract? Is that your question?

MR. CANTERBURY:

I asked him first if they could come in and get one on any different terms than that. He is the business manager.

THE WITNESS:

No. The agreement says that no one will be given a more favorable agreement. I couldn't, if I desired, as an agent, sign an agreement other than the ones in existence between the local [46] contractors and the Local 100.

Q (By Mr. Canterbury) Well, to make sure I understand you, Mr. Patterson, if Texas Distributors walked in at the very day you sent this contract to Connell and said, "We want an agreement for our employees." are you telling me that you could not negotiate one with them; all they could sign is that one right there in that little red book?

A I could not enter into a more favorable, or a less favorable agreement with any contractor than what is signed in this agreement.

Q I see. So that's — in other words, once you sign that contract with the Mechanical Contractors' Association, that sets the only type of agreement which your Union can enter into with any other mechanical contractors; is that correct, sir?

A That is true.

Q Now, since the beginning of this lawsuit, have you now entered into, or has Local 100 now entered into, another contract with mechanical contractors?

A We have entered into an agreement with the North Texas Contractors Association — not the Mechanical Contractors or Dallas, as in the past.

Q On your new agreement, would the same apply,

that if — that you cannot enter into any type [47] agreement, other than the one that you have agreed with North Texas, that it would have to be on the same terms and conditions to all others?

MR. RICHARDS:

I think this calls for speculation. The contract speaks for itself in this regard. I presume.

THE COURT:

Do you have a copy of the contract?

MR. CANTERBURY:

He is correct. I was going to try to save a little time, Your Honor.

(Plaintiff's Exhibit No. 6 marked for identification.)

Q (By Mr. Canterbury) Mr. Patterson, I will hand you what has been marked as Plaintiff's Exhibit 6, and ask you if you can identify that instrument, sir?

A Without reading the entire document, it appears to be the current contract in existence between Local Union 100 and Local Unions No. 146, Dallas and Fort Worth, with the North Texas Contractors Association.

Q Mr. Patterson, if you could look at Article 17, entitled "Working for Others," is that a similar clause that you referred to in the old contract?

MR. RICHARDS:

Well, I would suggest that the contract speaks for itself.

MR. CANTERBURY:

I agree, Your Honor, [48] except the contract is about 35 pages. If I can narrow it down to one clause, I will save time.

THE COURT:

I will permit him to question the witness with regard to that.

MR. RICHARDS:

Let me see if I have the same thing.

Q (By Mr. Canterbury) Excuse me, we have taken it away from you, Mr. Patterson. Have you had a chance to read it?

A Yes, I know what the clause says. The Article 17 I am familiar with.

Q Mr. Patterson, in your own words, what does the clause say?

MR. RICHARDS:

Again I object to that. I think the contract speaks for itself.

MR. CANTERBURY:

He is correct, Your Honor.

THE COURT:

Just read it, if you will. Read it, Mr. Patterson, out loud.

THE WITNESS:

The Union further agrees that during the life of this agreement that it will not grant or enter into any arrangement, or understanding with other employers which provides for any wages less than stipulated in this agreement as the minimum wages for work under any more favorable terms [49] or conditions to the employer than are expressed or implied in this agreement for less than the rate of wages indicated in this agreement.

Contractors agree not to employ any workmen subject to this agreement for less than the rate of wages indicated in this agreement, or under any more favorable terms or conditions than are expressed or implied in this agreement.

Further, no workman covered by this agreement shall bargain or contract for work or lump sum. And, further, the Union agrees that it will not furnish men to any employer not regularly engaged in the pipe trades industry as a plumbing, heating, air conditioning, and/or piping contractor, including rigging contractors; and this condition is not intended to cover members of the union whose regular employment is full time as maintenance men for any organization usually having such classifications of employee on its payroll.

Q (By Mr. Canterbury) Thank you, Mr. Patterson. Since you sent the proposed contract, which has been introduced into evidence, to Connell Construction Company, have you sent similar proposed sub-contractor contracts to other general contractors?

A Yes.

[50] Q In the Dallas area?

A Yes.

Q Do you know how many, sir?

A Since —

Q Yes, sir, since.

A I don't have the — I could give you almost the exact number of the total, but I don't know how many since this time.

Q The total will be fine.

A Total, 45.

Q You have sent out 25?

A Proposed agreements.

Q How many have been signed, sir?

A Give me a minute. Dowd Construction Company, Foursquare Construction Company, Cain, Brogdon and Cain, Cass Construction Company, Miller and Norton Company. That is all that have been signed at this time.

Q Are you presently picketing any general contractors, to your knowledge, is Local 100 presently picketing any general contractors for the same or similar agreement we are talking about in this lawsuit?

A As of today, no. But as of last week, yes.

Q Mr. Patterson, do you know how many Union [51] mechanical firms are in the Dallas area?

A How many Union mechanical firms?

Q Yes, sir.

A Doing business as local contractors, and as national agreement contractors, and as independent contractors, I would say that there are some 80 that are signatory, maybe more or maybe less, but approximately that.

Q Maybe I didn't hear you right. Did you testify that there are 75 parties to which your Union was in a contractual relationship as far as collective bargaining, in your whole jurisdiction?

A This is essentially correct. I don't have the complete list with me, but —

Q But you say there is approximately 80 companies?

A Yes, sir.

Q 80 Union companies?

A Right. I am talking — when I say "Union companies," I mean national agreement contractors who are signatory to our national agreement.

Q You cleared it up for me. Thank you.

Now do you know how many open shop mechanical plumbing companies there are in the City of Dallas? [52] A There are — too numerous to enumerate.

Q Do you know, sir?

A No, I don't know. I have no way of knowing.

Q Have you picketed a company by the name of "Texas Distributors" on numerous occasions?

A Many occasions.

Q Have you ever tried to get a collective bargaining agreement with Texas Distributors?

A Yes. Texas Distributors has made overtures to Local Union 100 throughout the years to signify that they might be inclined to sign an agreement; they always seem to back out at the last moment. And we have never signed them.

Q Has there ever been any question as to whether or not all of their employees will be admitted to the Union if they joined up?

A There is no question on our part. I don't know the thinking of Texas Distributors.

Q Well, how about on your part, if Texas Distributors signed up tomorrow would all of their employees be allowed to come into the Union?

A Yes, all that could qualify. We have certain standards, like any other organization. Certainly we would — if they could meet the qualifications, they would be welcome. That is our purpose, to [53] try to organize the unorganized.

Q How many members does Local 100 have, Mr. Patterson?

A Approximately 1,100. This includes apprentices.

Q Are there any union construction — strike that.

Are there any construction projects which have a union mechanical sub-contractor which work people

who are not members of your union, or not apprentices of your union, to your knowledge, sir?

A Counsel, would you rephrase that?

Q Yes, I will rephrase it.

To your knowledge, are there any individuals working as plumbers for union companies, who are not members of your union?

A Yes. We have what we call a "travel" card.

Q All right, sir.

A I think you are familiar with.

Q Yes, sir, we are very familiar with the travel card.

How about any other classifications?

A We have presently some people working in the status of what we call an "application," whereby [54] they appear to have the qualifications for membership; they make application on a formal form, and upon review are placed in the employment of signatory contractors.

Q In other words, these are men who have applied for membership, and —

A Right, and are working under the same protection, same wages, conditions as members.

Q Do you know of any union mechanical contractor who works men with the permission of Local 100, who are neither travelers, union members, or applicants for union membership?

A Do I know of any one who is signatory?

Q Yes, sir.

A No, I don't.

Q Would you allow it, if you knew of such a condition?

MR. RICHARDS:

I will object. Your Honor. This calls for —

THE COURT:

I sustain the objection.

Q (By Mr. Canterbury) I will rephrase the question.

Mr. Patterson, will Local 100 allow non-union employees who are neither members of the union, applicants, or travel card members, to work on [55] construction projects with companies that have a union contract with your firm?

MR. RICHARDS:

I have the same objection. The contract speaks for itself. It describes what the conditions are.

THE COURT:

I am going to overrule the objection.

MR. CANTERBURY:

Thank you, Your Honor.

THE WITNESS:

Would we allow it?

Q (By Mr. Canterbury) Do you allow it?

A Would we allow it? I don't see that we would have any choice. I think that this is a — to my understanding, this is a right-to-work state. I don't suppose we would have any choice in the matter.

Q Mr. Patterson, have you ever given any trouble or called any employers concerning their hiring non-union plumbers?

A No.

Q You have never asked them to fire one?

A No.

MR. RICHARDS:

Your Honor, this is going awfully far afield from the Complaint, it seems to me.

MR. CANTERBURY:

Your Honor, I don't believe so. We have alleged in our pleadings —

THE COURT:

He has answered the question, [56] and no objection was made.

Q (By Mr. Canterbury) Mr. Patterson, in proposing this contract to Connell Construction Company, prior to the time you proposed it, were you aware of the fact that Connell did business with numerous open shop mechanical firms?

A I wasn't aware of their total labor policy. I don't know how many open shop firms, mechanical, electrical, or otherwise, that they do business with.

Q Did you know they did business with any open shop mechanical firms?

A No, not to my knowledge at the time, I did not. At the time I proposed this, I had already, as I stated, proposed such an agreement to other mechanical — to other general contractors. No.

Q When you started — when Local 100 started picketing on the Bruton Venture project, did not Connell have a union mechanical contractor on that job?

A Yes, they had a union contractor, Dallas Air Conditioning.

Q And the purpose of the picketing, it has been stipulated, was to get Mr. Connell to sign this agreement; correct?

A This is correct.

Q And you wanted Mr. Connell to not do [57] business with any company that doesn't have a contract with Local 100?

A That is what the proposed agreement states, and what my cover letter also asks.

MR. CANTERBURY:

I will pass the witness, Your Honor.

THE COURT:

We will take a 15 minute recess at this time.

(Whereupon, a short recess was taken, after which the proceedings resumed as follows:

THE COURT:

He had passed the witness.

MR. RICHARDS:

No questions.

MR. CANTERBURY:

Excuse me, one more question.

Q (By Mr. Canterbury) Mr. Patterson, in your capacity as Business Manager for Local 100, have you asked Mr. Dave Keller, in his capacity at the Dallas Trades Council, or other unions, not to perform work when you have a picket of the nature you had on Connell's job?

A No. We have never asked Mr. Dave Keller, as Secretary of the Dallas Buildings and Trades Council, nor have we asked any individual union not to perform work on any job.

Q Has your intention to picket general [58] contractors for this type of agreement, has it been discussed in the Buildings and Trades Council?

MR. RICHARDS:

I would object, unless you get specific as to time. I may still have an objection then as to time and specific picketing. Let's find out what they are talking about.

MR. CANTERBURY:

I will rephrase the question, Your Honor.

Q (By Mr. Canterbury) At any time in the last eight months, has picketing by Local 100, for a sub-contractor agreement, been discussed at the Dallas Buildings and Trades Council meetings?

MR. RICHARDS:

I would object to any questions, unless they relate specifically to Connell. I don't know what relevancy this discussion would have with respect to some other picketing for some other contract.

THE COURT:

I will overrule the objection.

THE WITNESS:

The question is, have we discussed sub-contract picketing?

Q (By Mr. Canterbury) By Local 100.

A By Local 100, in the Buildings and Trades Council. No. I think that everyone in the Buildings and Trades individually are aware that we are picketing, because throughout the area we have picketed for the [59] last three years for this type of an agreement. I think that all agents, and most of the members are aware that we are conducting this type of picketing.

MR. CANTERBURY:

I have no further questions, Your Honor.

MR. RICHARDS:

No questions.

MR. CANTERBURY:

If the Court please, at this time the plaintiff rests, Your Honor.

MR. RICHARDS:

Your Honor, we would move to dismiss at this time, on the basis that the plaintiff has failed to prove a violation of either State or Federal antitrust laws. And if Your Honor would like to hear us in detail upon it I am, prepared to support the motion.

THE COURT:

Are you only moving for judgment on the basis of the State antitrust laws, and not on the other point?

MR. RICHARDS:

Both the State antitrust, and Federal antitrust.

May I be heard on it?

• • • •

[64] THE COURT:

I will withhold the ruling on the motion.

MR. RICHARDS:

I was making my motion pursuant to Rule 50. I apologize for not so stating.

We would first, if Your Honor please, then like to

offer a deposition we took by written questions, if I may, by agreement of counsel. We will offer the entire deposition. I will read it in, or, [65] if the Court requires — or, we will offer the testimony, whichever way is most expeditious as far as the Court and Counsel.

THE COURT:

I want you to read whatever part you want me to consider.

MR. RICHARDS:

I shall, Your Honor.

Defendant offers in evidence the deposition, on written questions, taken pursuant to Rule 31 of John A. Cinquemani.

"Q Please state your full name.

A John A. Cinquemani.

Q Are you over 21 years of age?

A Yes.

Q Please state your residence address, including street address, city, and state.

A 7924 Allott Avenue, Van Nuys, California.

Q Please state the name and address of the labor organization or organizations with whom you are employed, and the duration of your employment.

A Los Angeles Building and Construction Trades Council, 1626 Beverly Boulevard, Los Angeles, California. I was appointed to the position of Staff Representative, Los Angeles Building Trades Council in 1953, and in November, 1964, was elected Executive Secretary, and am still serving in that capacity for [66] the Los Angeles Building and Construction Trade Council.

Q Please state briefly your responsibilities and duties of your office, or offices.

A The position of staff representative is to secure and enforce collective bargaining agreements. And the duties of the executive secretary are to supervise the buildings representatives. The executive secretary is the chief administrative officer of the Council. A copy of the by-laws which describes other duties is enclosed."

And thereupon, Exhibit No. 1 was marked, which is the By-Laws of the Council.

We would offer the By-Laws.

MR. CANTERBURY:

Objection, Your Honor. I'm going to object to the rest of the deposition as being completely immaterial. It involves a gentleman in Los Angeles, California, with a Los Angeles Buildings and Trades Council. What goes on in California has no real relation to this lawsuit. I think it is entirely immaterial.

THE COURT:

Will you state what your purpose is, Mr. Richards.

MR. RICHARDS:

Yes, I will. Your Honor, the purpose of the deposition is to show, among other [67] things, that there is — to establish the existence of a collective bargaining agreement, which is attached to the deposition as Exhibit A, and known as the Los Angeles Buildings-Trades Agreement. It contains a provision as follows: "The employer, developer, and/or owner builder agrees that all work performed within the jurisdiction of any union affiliated with the Council shall be performed pursuant to an executed agreement with the appropriate union having work in the territorial juris-

diction, and affiliated with the Council in the area in which the work is performed." We offer that this agreement was in existence, containing language identical to ours, and would affect some 9,000 employers, that this agreement, or one similar to it, has been in existence in the construction industry — in this instance in California — for, according to the deposition, for some 12 or 15 years. It is related also to the fact that when Congress enacted Section 8E of the Act, one of the express purposes was to preserve the integrity of bargaining agreements, sub-contractor agreements in the construction industry. One of the purposes is to show the existence of such agreements before Congress enacted Section 8E, and that the continued existence of such agreements in California, and the [68] fact that this agreement has been the subject of a number of proceedings before the National Labor Relations Board, in cases which we have cited in our brief, and which the Board has uniformly upheld the legality of the agreement.

Now it speaks to, it seems to me, number one, the legality of this agreement under Section 8E, and necessarily the reasonableness of the Agreement under the Sherman and Clayton Act. Obviously, it wouldn't speak to the State laws.

THE COURT:

I will overrule the objection.

MR. CANTERBURY:

May I have a continuing exception to the rest of the deposition, Your Honor?

THE COURT:

Yes, you may.

MR. RICHARDS:

Continuing with question number seven:

"Q Please identify, if you can, the contract attached hereto as Exhibit A.

A Exhibit A is a copy of a current article of the agreement, the collective bargaining agreement, executed by the Buildings Trade Council, which are listed at the end of the Articles of Agreement. This is an agreement to which the Buildings Trade Council secured the signature of employers in the building and construction industry."

[69] We would offer Exhibit A as it is attached to the deposition, it being the Agreement to which I refer in my question.

"Q Is this contract a standard form currently in use by your organization?

A Yes.

Q If you know, over what period of time has Exhibit A been regularly in use by your organization?

A Exhibit A has been in use since August 20, 1965. The predecessor agreement, containing language identical, or similar to Article 4 has been in use since at least 1947 by the Buildings Trade Council. The files of this organization, over which I am custodian, show articles of agreement with language similar to Article 4," — which was the article I read — "dating back to at least 1947. And an example of such an agreement is submitted herewith."

Whereupon it was marked Exhibit 2 for identification.

We offer Exhibit 2.

"Q Does your organization currently have in existence an agreement identical to that exemplified by Exhibit A?

A Yes. Each of the Building Trade Councils listed in Article 12 uses the same form of [70] agreement as exemplified by Exhibit A.

Q Does your organization maintain in the regular course of business a file, or other business record, containing the names of contractors who are currently signatory to your agreement with your oganization of the type exemplified by Exhibit A?

A Yes.

Q Is it customary for entries to be recorded and/or transmitted to the file or record inquired about in the preceding question by an employee or representative of your organization who has personal knowledge of the existence of such agreement?

A Yes.

Q Is such information concerning the existence of such agreements recorded or transmitted at or about the time the contracts are executed?

A Yes.

Q Based on the foregoing records. please state the number of contractors who are currently signatory to an agreement with your organization identical as to form to that exemplified by Exhibit A.

A 9,722.

Q In the records of your organization, as inquired about in questions 11, 12 and 13, do you have [71] available a list of the names and addresses of all contractors who are currently signatory to an agreement identical in form as that exemplified by Exhibit A? If so, please attach a copy of such list to your answers.

A Yes. A copy of the directory of Union contractors listing the names and addresses of the contractors party to both the Building Trades Agreement and to con-

tractor association agreements is attached hereto. Also attached is the current supplement."

Whereupon the directory was marked as Exhibit 3 and the supplement was marked as Exhibit 4 upon instruction of Mr. Reich.

"Q Does your organization enforce or attempt to enforce with respect to contractors who are parties to Exhibit A the sub-contractor limitations provided in paragraph 4(IV)?

A Yes.

Q If your answer is Yes, please state the manner in which your organization enforces the subcontractor limitations.

A Article IV is enforced through court action by the attorneys for the Building Trades Council. At least 25 such suits have been successfully brought [72] and injunctions secured against contractors who have been violating Article IV.

Q Does your organization have contractual relations with any contractors in the construction industry which contracts do not contain the sub-contractor limitations provided in paragraph 4 (IV)?

A No.

Q Has your organization engaged in picketing of any contractor to obtain the contractor's agreement to a contract including the sub-contracting limitations reflected in paragraph 4(IV)?

A Yes.

Q If your answer to the foregoing is "Yes", please provide the names and addresses of all such contractors who have been picketed by your organization for such purpose within the past twelve months?

A We do not have readily acceptable records show-

ing which contracts were secured through picketing. The supplement to the directory of Union contractors shows the names and addresses of both contractors who signed between March 1970 and February 1971.

Q Please state the names, positions and addresses of each person, if any, who assisted you in [73] the preparation of the answers to these questions.

A Julius Reich, attorney for the Los Angeles Building and Construction Trades Council, 1625 West Olympic Boulevard, Los Angeles, California 90015."

We will offer the deposition and the exhibits into evidence.

MR. CANTERBURY:

May I have an objection.

THE COURT:

Yes.

MR. RICHARDS:

Off the record.

(Discussion off the record)

• • • •

[86] BY MR. RICHARDS:

Q Mr. Patterson, I am referring you to Plaintiff's Exhibit 6A, about which you have previously testified, and call your attention to Article 24 —

THE COURT:

State what it is.

MR. RICHARDS:

Yes. This is the current, as I understand it, agreement between Local 100, 146 [87] in Fort Worth, and the North Texas Contractors Association.

Q (By Mr. Richards) Is that correct?

A That is correct.

Q And Mr. Canterbury did not refer to — he had you read a portion of the contract a moment ago.

I would like to ask you to read that portion of Article — the last paragraph of Article XXIV that appears at page 30 of the agreement.

Do you see what I am talking about?

A Yes.

Q Would you read that, please? Read it aloud.

A "Local Union Number 100, and Local Union Number 146 agrees that if during the life of this agreement it grants any employer any better terms or conditions than those set forth in this agreement, such better terms and conditions shall be made available thereafter to all employers for the life of this agreement."

Q That is also a part of the over-all agreement that you currently have in effect with the North Texas Contractors Association?

A It is our agreement.

[88] Q Do you know whether Mr. Connell is a member of the — is Connell Construction Company a member of the North Texas Contractors Association?

A I don't know. I think that they are signatory.

MR. RICHARDS:

Mark this.

(Defendant's Exhibits Nos. 8 through 11, inclusive, marked for identification.)

Q (By Mr. Richards) Mr. Patterson, I think you have testified that, in response to questions from Mr. Canterbury, that you have picketed other general contractors in the Dallas area for an agreement identical to that that is here in issue; is that correct?

A That is correct.

Q Was one of those contractors a Kas Construction Company?

A Yes.

Q I hand you Defendant's Exhibit No. 8, and No. 9, and ask you if those are letters — if Defendant's Exhibit 8 is a letter of yours to Kas Construction Company, on or about the date indicated, of April 9, 1970. Is that what it is?

A This is the letter. It says, "Kas Construction Company."

[89] Q And did that letter include with it a contract?

A Yes.

Q What is —

A This is the same type of contract offered every other general contractor in the area.

Q All right. Is Defendant's Exhibit No. 9 the contract that was sent to Kas — do you want to check it?

A Yes.

Q Did Local 100 thereafter picket Kas Construction Company, in order to secure their agreement to the contract that is here as Defendant's Exhibit No. 9?

A Yes, we did picket.

Q Did Kas Construction Company, thereafter, file charges with the National Labor Relations Board, alleging such picketing violated the National Labor Relations Act?

A Yes, there were charges filed.

Q Was your local union represented by counsel during the investigation of those charges?

A Yes.

Q And who was that?

A David Richards.

Q Were those charges investigated by the [90] Regional Office of the National Labor Relations Board in Fort Worth?

A They were.

Q I hand you what has been marked as Defendant's Exhibit 10, and ask you if you can identify that as a — if you can identify that?

A Yes, I can identify it.

Q Is that a copy of the letter from the Regional Director in Fort Worth, dismissing the charges filed by Kas?

A This is a copy of a letter from Mr. Elmer Davis, Regional Director, dismissing the charges.

Q Did Kas Construction Company thereafter appeal that, if you recall, to the General Counsel of the Labor Relations Board?

A That is correct.

MR. CANTERBURY:

Your Honor, I am going to object to following the proceedings of another case through the NLRB.

MR. RICHARDS:

We think we can tie it up.

THE COURT:

I will overrule the objection.

Q (By Mr. Richards) Is Defendant's Exhibit No. 11 the decision of the General Counsel of the National Labor Relations Board, confirming the dismissal [91] of the charges against Local 100?

A Yes, Exhibit 11 is a letter confirming, from the National Labor Relations Board.

MR. RICHARDS:

We have previously marked these defendant's exhibits, Your Honor. We will offer Defendant's Exhibits 8, 9, 10, and 11 at this time.

MR. CANTERBURY:

Your Honor, I would object to all of them, because the only conclusion — I'm familiar with the matter, as Dave knows. They conclude, in a matter that went to the National Labor Relations Board, the general counsel of the Board dismissed it — one man's opinion. And we have a new General Counsel of the Board now, anyway. So one man's opinion really should not be real evidence in this case.

THE COURT:

I will take that into consideration.

MR. RICHARDS:

Do you agree to the authenticity? Is that correct?

MR. CANTERBURY:

I agree they are true and correct copies.

MR. RICHARDS:

We will offer then, those exhibits.

May they be received, Your Honor?

THE COURT:

They may be admitted.

[92] (Defendant's Exihibits Nos. 8, 9, 10, and 11, inclusive, were received into evidence.)

Q (By Mr. Richards) Mr. Patterson, in picketing Kas Construction Company, do you recall what the picket sign said?

A I think it was a standard-type picket, that we usually use. It is to advertise the fact that Kas Construction Company did not have a subcontract agreement with Local Union Number 100.

Q The same type picket sign that was used at Connell?

A Right.

Q And the contract which you were seeking with Kas Construction Company, was it identical with the contract we propose to Connell; is that correct?

A Correct.

MR. RICHARDS:

That's all that I have, Your Honor.

MR. CANTERBURY:

I have no further questions of this witness, Your Honor.

THE COURT:

You may step down, Mr. Patterson.

MR. RICHARDS:

We rest, Your Honor.

[31] K. L. ROBINSON

• • • •

[37] CROSS EXAMINATION

By Mr. Richards:

• • • •

[38] Q Are you aware generally of the collective bargaining contract to which Mann is a party?

A Yes, I am.

Q Are you aware that they are a party to what is known as an International Agreement with the ironworkers?

A Yes, I am.

MR. RICHARDS:

Mark this.

(Defendant's Exhibit No. 1 marked for identification.)

Q (By Mr. Richards) I will hand you what the reporter has marked as Defendant's Exhibit 1, which is a printed form contract, with no signatures — as you will see — and ask you if you recognize that as being a true copy of the International Agreement to which Mann Steel is presently a party with the Ironworkers International?

A I believe that it is.

MR. RICHARDS:

We would offer Defendant's Exhibit No. 1.

Q (By Mr. Richards) By the way, Mann is a Dallas contractor; is that right?

A Yes, sir.

• • • •

[94] MR. CANTERBURY:

May it please the Court, Your Honor, there is not a lot in factual dispute in this case which is obvious. We have stipulated the majority of the facts. The evidence, and the [95] stipulations unquestionably show that there is an attempt by Local 100 to force an employer, Connell Construction Company, Inc., to assist it — to assist it — in keeping non-union companies from obtaining work on construction projects of Connell. Mr. Patterson testified that he has tried this 40 times.

As far as antitrust, Your Honor, you can readily see that if he is successful, that non-union companies will be driven from the market place on construction work in the Dallas area.

You can see from the evidence — Mr. Stewart testified that we entered into an interim agreement after Her Honor retained jurisdiction in this case, to prevent further picketing, whereby we agreed not to use any open shop mechanical contractors, pending the outcome of this case. When the architects specify, Your Honor, that only particular subcontractors will be allowed on the job, the contractor receives competitive prices; if he is cut off from going to half of the list, then he is in fifty percent less competitive position than anyone else going in.

And what about the companies, Your Honor, who,

for no fault of their own, that — maybe their employees don't want to be union, maybe they would like to belong to another union — it is not for [96] Connell to dictate, or any employer to dictate the labor relations of another employer. Now this is what they are doing. They are trying to drive the companies from the market place. That it restricts competition is obvious. Federally, it also violates Federal antitrust law. When you cut down the number of people who can bid, you have lessened competition; when you enter into an agreement to prevent someone from pursuing a lawful business, it is antitrust. Admittedly — and I think the agreement on its face, I am perfectly satisfied, shows an antitrust violation, Your Honor.

Then we question whether the union is exempt. Admittedly, unions enjoy certain exemptions under the antitrust laws. Your Honor had the Cedarcrest Hat case several years ago where you considered this very issue. In that case you found that they had an antitrust exemption — and they did; they were not trying to get an employer to help them. You said in the Cedarcrest case — and the Fifth Circuit affirmed you, Your Honor — that if a union, acting alone, takes certain action which may be antitrust otherwise, they enjoy exemptions. But if they conspire with an employer, or employers, they forfeit those exemptions.

They have attempted to conspire with Mr. Connell, with Connell Construction Company. Connell [97] Construction Company was an unwilling conspirator, suffered the consequences, had their job shut down. But the attempt to involve an employer to help the union drive other companies from the market place is obvious. Factually it is there.

Now the cases on how a union forfeits its exemption, I have covered them in my brief, Your Honor. Allen Bradley, I think, is the classic case in this area, where a union conspired with an employer or employers to either fix prices, lessen competition, et cetera, it is a violation, they lose their exemption. Now the exemption, if it is lost, the antitrust exemption, if it is lost they have no more right to violate the antitrust laws than Connell Construction Company, or myself, or any other company. They have forfeited their exemption in this case.

I would like to refer quickly to the Gibboney case.

THE COURT:

What case?

MR. CANTERBURY:

The Gibboney case. This was a Supreme Court case in 1949. It is in my brief, Your Honor, and cited therein. The Gibboney case, the Supreme Court in that case recognized that a union violated a state antitrust law by picketing in a manner that violated the state antitrust law. If it [98] troubles Your Honor about the state law versus federal, I think it violates both. But it clearly violates the Federal. The state law, the statutes you can read them out in the Texas Business and Commerce Code. And the agreement which this lawsuit is over is a clearcut violation of every one of them, clearcut. A reading of the statute comparing the agreement is readily obvious.

Your Honor, I would like to talk about Section 8E of the Labor Act. The defendant takes the position that Section 8E authorizes a subcontractor agreement,

therefore state antitrust laws, federal antitrust laws have no application.

Your Honor, 8E does not authorize this type of agreement, nor this type of conduct. In my brief I have covered the legislative history, right through a case known as the Sandori case. Your Honor, the Sandori case official title is United Brotherhood of Carpenters v. NLRB, 78 Sup. Ct., 1011, 1958. In this case there was a subcontractor agreement that carpenters would not handle prefabricated doors, would not handle those goods, they would not have to work with them. A secondary boycott was found. Congress came in 1959 and enacted Section 8E specifically. Then Senator Kennedy stated that Section 8E does not alter the Sandori case. Senator Goldwater did, also. [99] The two of them both agreed on this, that the Sandori case stood. And, also, the secondary boycott principles weren't changes.

What, Section 8E was for, Judge, is to prevent an employer from going and entering into a contract with his employees, or a union representing his own employees. The example is Mr. Connell and the carpenters. And it prevents him from then going out and subcontracting their work away, the work of his own employees whose labor policies he may have something to say about. That type of an agreement being negotiated is legal.

The Fiberboard case, Supreme Court case, which says that sub-contracting is a mandatory subject for bargaining between an employer and a union representing his employees, we readily admit. That is what Section 8E is all about, Your Honor. It is not to allow a union to come in to one employer and say, "Let's

dictate the terms of conditions to somebody else you don't have any control of; I can't organize them, so you just quit doing business with them." And that is what this lawsuit is all about; it is antitrust.

I touch on one other case, Your Honor, I would like for you to read. It is the Pennington case. [100] It is cited in my brief. In Pennington the Supreme Court said, "Parties in one bargaining unit are not free to dictate the terms for parties in another bargaining unit." Connell says he has no plumbers; he is not free to dictate the labor relations policies of his subcontractors.

I have one final important note, Your Honor, to keep in your mind as the real test. Whose employees are they? What are we talking about? The National Woodworkers case cited by Mr. Richards in his brief, in that case the Supreme Court said, "The touchstone is whether the agreement or its maintenance is addressed to the labor relations of the contracted employer, vis-a-vis his own employees." It is not here, Judge. It doesn't have a thing to do with Connell's employees. I think the Supreme Court, when it said that, indicated that first you have to decide here who we are talking about. And unions aren't free, and should not be free to come to a neutral employer and say, "Quit doing business with other people." The neutral employer has no right to control his subcontractors' labor policies.

So, Your Honor, I respectfully request that you grant us the relief which we prayed for. It is needed. You have seen what a bad competitive [101] position it has put my client in. It is going to hurt innocent companies who are just going to be eventually out of busi-

ness. It is antitrust. And I request you so find, Your Honor. Thank you.

MR. CANTERBURY:
Your Honor, we have no further evidence. We request some oral argument.

THE COURT:
Yes, I would be glad to have your argument.
[93] As I understand your brief, and Mr. Richards' brief, it is your contention that because Connell did not employ any workers who were plumbers —

MR. CANTERBURY:
Yes, Ma'am, that's right.

THE COURT:
— that the contract is not a valid contract.
I believe that you can see that if he had employed plumbers, and had a contract with them, that this contract would be a valid contract.

MR. CANTERBURY:
Yes, Your Honor.

THE COURT:
Is that your contention?

MR. CANTERBURY:
That is a fair statement, yes, Your Honor.

THE COURT:
As I understand Mr. Richards, he is saying that re-

gardless of whether or not Connell had any plumbers in his employment, it is a valid contract.

MR. RICHARDS:
Yes, Your Honor. And just as the buildings trades agreements which we have offered in evidence apply to people who have no members working for the general contractor —

THE COURT:
In reading the briefs, it was not clear that any case was directly in point. Now I have not myself had an opportunity to read any of the [94] cases, but the briefs did not indicate that they were directly in point on this particular question.

MR. RICHARDS:
The Kas case is directly in point, Your Honor. But other than that — but that is not a reported decision.

THE COURT:
And it is only a decision —

MR. RICHARDS:
Yes, Your Honor, of the General Counsel of the National Labor Relations Board.

MR. CANTERBURY:
It is not a decision of the National Labor Relations Board.

THE COURT:
Not the Administrative Agency, just the General Counsel himself.

MR. RICHARDS:

Yes, Your Honor. But under the Act, the General Counsel does issue decisions that have — the rules and regulations of the Board set those out. Obviously, it is not a decision of the Board itself; that is correct.

THE COURT:

All right.

MR. CANTERBURY:

May I proceed, Your Honor?

THE COURT:

Yes.

• • • •

PLAINTIFF'S EXHIBIT No. 1

STIPULATIONS OF FACT

(Number and Title Omitted)

TO THE HONORABLE UNITED STATES DISTRICT JUDGE:

Comes now CONNELL CONSTRUCTION COMPANY, INC., Plaintiff, and PLUMBERS AND STEAMFITTERS LOCAL UNION NO. 100, Defendant, by and through their respective attorneys of record, and make the following Stipulations of Fact, such Stipulations being a portion of the facts in this action:

1. That Plaintiff is in the business of building construction with its principal office being located in Dallas County, Texas, and is engaged in interstate commerce, or in a business affecting interstate commerce;

2. That Plaintiff does not, and has not, employed plumbers and steamfitters, and that at all times material to this case, Plaintiff has had no employees who are members of, or who are represented by Defendant;

3. Although, on occasions, an owner may choose not to include the mechanical installation of a project in Plaintiff's contract, it is customary for Plaintiff to have included the mechanical installation as a portion of its total contract, which mechanical work Plaintiff uniformly subcontracts to other companies or firms;

4. That, on November 25, 1970, Mr. A. B. (Pat) Patterson forwarded the letter and proposed contract attached to these Stipulations as Exhibits "A" and "B" to Plaintiff and Plaintiff received such letter and proposed contract on December 3, 1970;

5. That A. B. (Pat) Patterson and O. D. Seastrunk are agents of Defendant;

6. That in the past Plaintiff has subcontracted the mechanical installation of its construction projects to some firms which do not have a Collective Bargaining Agreement with Defendant as well as to some firms which do have such an Agreement with Defendant;

7. That on January 19, 1971, Thomas H. Stewart, President of Plaintiff, forwarded the letter attached to Plaintiff's Amended Complaint as Exhibit "C" to Mr. Patterson who received the same shortly thereafter;

8. That on or about January 15, 1971, Defendant picketed a construction site of Plaintiff located at 8700 Stemmons Freeway, Dallas, Texas, where Plaintiff was constructing a multi-story office building for Bruton Ventures, such picketing was conducted by a single picket and was attended by no violence;

9. That when Defendant's picket appeared at Plaintiff's jobsite some of Plaintiff's employees and some employees of Plaintiff's subcontractors left the jobsite and refused to work;

10. That Defendant's picketing of Plaintiff's jobsite was for the purpose of obtaining Plaintiff's signature to the contract form which is attached hereto as Exhibit "B";

11. That Defendant has never been requested and has never referred any employees to work for Plaintiff;

12. That for a period in excess of ten (10) years Plaintiff has on occasion subcontracted mechanical work to a firm known as Texas Distributors;

13. That Defendant has no Collective Bargaining Agreement with Texas Distributors;

14. That Plaintiff has in the past subcontracted mechanical work to qualified plumbing and mechanical firms whether or not such firms have a Collective Bargaining Agreement with Defendant;

15. That Defendant has picketed other General Contractors in the Dallas area and a similar Agreement has been obtained from some of those General Contractors;

16. That the picket placed by Defendant remained on Plaintiff's jobsite at Bruton Ventures project from the 15th day of January, 1971, until the 21st day of January, 1971, when such picketing was restrained by the Honorable Charles E. Long, Jr., Judge of the 134th District Court of Dallas County, upon allegations of Plaintiff that the actions of Defendant violated the Anti-Trust Laws of the State of Texas.

The above listed Stipulations of Fact are hereby approved and agreed upon.

CLINTON & RICHARDS
(Signed) DAVID R. RICHARDS
DAVID R. RICHARDS
308 West 11th Street, Suite 205
Austin, Texas 78701 — 476-4822
Attorneys for Defendant,
PLUMBERS AND
STEAMFITTERS LOCAL
UNION NO. 100

SMITH SMITH DUNLAP &
CANTERBURY
(Signed) JOE F. CANTERBURY, JR.
JOE F. CANTERBURY, JR.
4000 First National Bank
Building
Dallas, Texas 75202 — 748-7051
Attorneys for Plaintiff,
CONNELL CONSTRUCTION
COMPANY, INC.

PLAINTIFF'S EXHIBIT No. 2

UNITED ASSOCIATION
of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada

LOCAL UNION 100, CITY Dallas, STATE Texas,
DATE November 25, 1970

Connell Construction Company
10939 Shady Trail
Richardson, Texas 75220

Gentlemen:

This Local is engaged in a continuing effort to improve and protect the wages and work opportunities of those it represents through lawful and legitimate means. In this connection the enclosed contract has been prepared and is tendered to you with the request that you execute and return it to this Local.

The contract was drafted to conform to the provisions of Section 8 (e) of the Labor-Management Relations Act. Should you have any doubt as to its legality, please advise us promptly.

We hope that you will see fit to execute the enclosed contract. In the event you decide not to become a party to this agreement we would appreciate your early reply. Should we have not heard from you by Monday, December 7, 1970, we will interpret your silence as a rejection. In the event you should refuse to sign the enclosed contract, it is our intention to employ the lawful means available to us to protest this refusal.

By this proposed contract we do not seek for you to terminate any existing contractual or business relationship, nor do we seek to force or require your firm to recognize or bargain with this organization, and we do not seek to organize your employees. Our sole purpose in proposing the enclosed contract and any efforts that may in the future be made to obtain such contract are those purposes made lawful by Congress in the enactment of Section 8 (e) of the Labor-Management Relations Act.

Be assured that all activities by this Local to secure and/or enforce this contract will be in strict compliance with state and federal law. Should you ever have information to the contrary, please advise the undersigned promptly, so that any necessary steps can be taken to insure that there are no violations of the law.

We shall appreciate your consideration of this request.

Sincerely,

(Signed) A. B. "PAT" PATTERSON
A .B. "Pat" Patterson
Business Agent
Plumbers & Steamfitters
Local Union No. 100

be
opeiu # 277

PLAINTIFF'S EXHIBIT No. 3

AGREEMENT

This Agreement entered into this ____ day of _____, 1970, by and between the signatory contractor, hereinafter referred to as Contractor, and Local Union No. 100 of the United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry hereinafter referred to as Union,

WITNESSETH

WHEREAS, the contractor and the union are engaged in the construction industry, and

WHEREAS, the contractor and the union desire to make an agreement applying in the event of subcontracting in accordance with Section 8 (e) of the Labor-Management Relations Act;

WHEREAS, it is understood that by this agreement the contractor does not grant, nor does the union seek, recognition as the collective bargaining representative of any employees of the signatory contractor; and

WHEREAS, it is further understood that the subcontracting limitation provided herein applies only to mechanical work which the contractor does not perform with his own employees but uniformly subcontracts to other firms;

THEREFORE, the contractor and the union mutually agree with respect to work falling within the scope of this agreement that is to be done at the site of construction, alteration, painting or repair of any building, structure, or other works, that is the contractor should contract or subcontract any of the aforesaid work falling within the normal trade jurisdiction of the union, said contractor shall contract or subcontract such work only to firms that are parties to an executed, current collective bargaining agreement with Local Union 100 of the United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry.

_____
Union

_____
Contractor

PLAINTIFF'S AGREEMENT No. 4

AGREEMENT

This Agreement entered into this 28th day of March, 1971, by and between the Signatory Contractor, hereinafter referred to as CONTRACTOR, and Local Union No. 100 of the United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry, hereinafter referred to as UNION,

WITNESSETH:

WHEREAS, CONTRACTOR and UNION are engaged in the construction industry; and,

WHEREAS, CONTRACTOR and UNION desire to make an agreement applying in the event of subcontracting in accordance with Section 8(e) of the Labor-Management Relations Act; and,

WHEREAS, it is understood that by this Agreement, CONTRACTOR does not grant, nor does UNION seek, recognition as the collective bargaining representative of any employees of the Signatory CONTRACTOR: and,

WHEREAS, it is further understood that the subcontracting limitation provided herein applies only to mechanical work which CONTRACTOR does not perform with its own employees, but uniformly subcontracts to other firms:

NOW THEREFORE, CONTRACTOR and UNION mutually agree with respect to work falling within the

scope of this Agreement that is to be done at the site of construction, alteration, painting or repair of any building, structure, or other works, that if CONTRACTOR should contract or subcontract any of the aforesaid work falling within the normal trade jurisdiction of UNION, said CONTRACTOR shall contract or subcontract such work only to firms that are parties to an executed, current collective bargaining agreement with Local Union 100 of the United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry.

It is the further understanding of the parties hereto that CONTRACTOR, CONNELL CONSTRUCTION COMPANY, INC., has entered into this Agreement under protest and that the said CONTRACTOR has instituted proceedings to test the legality of this Agreement; however, both parties will abide by the final decision of the highest court which rules on the legality of this Agreement.

This Agreement is cancellable by either party hereto upon Ten (10) days' written notice to the other.

UNION further agrees that it will not picket CONTRACTOR directly while this Agreement is in force and being complied with by CONTRACTOR.

LOCAL UNION 100 OF THE
UNITED ASSOCIATION OF
JOURNEYMEN AND
APPRENTICES OF THE
PLUMBING AND
PIPEFITTING INDUSTRY

(Signed) OSCAR D. SEASTRUNK
UNION
CONNELL CONSTRUCTION
COMPANY, INC.
(Signed) THOMAS H. STEWART
THOMAS H. STEWART,
President
CONTRACTOR

PLAINTIFF'S EXHIBIT No. 5

WRIGHT-RICH AND ASSOCIATES ARCHITECTS AND PLANNING CONSULTANTS

April 29, 1971

TO: General Contractors, First National Bank Tower, Garland, Texas

FROM: Wright-Rich and Associates, Architects

SUBJECT: Approved Sub-Contractors

The following is a list of approved sub-contractors which were selected from the submittals received:

I. Mechanical and Plumbing

1. Arcadia Plumbing Co. — 4825 Cole Ave
2. Avery Air Conditioning — 5607 E University Blvd
3. Allied Mechanical Contractors — 6106 Wycliff
4. Beard Plumbing Co.
5. Burden Brothers, Inc.
6. Beatty-Berger Eng. Co. — 9966 Monroe
7. Brandt Engineering, Inc. — 11345 Indian Trail
8. Caudle Engineering (Plumbing), Garland — P.O. Box 5386, 75222
9. Cohn-Daniel Corporation
10. C. Wallace Plumbing Co.
11. Dallas Air Conditioning, Inc. — 1708 Cedar Springs
12. Drew Woods, Inc. — 3201 LBJ Freeway
13. Ideal Plumbing — 2127 Irving
14. Kieffer Plumbing and Heating Co.
15. Lone Star Mechanical — Carlisle Inc., 11858 E NW Hwy
16. McBroome-Bennett Mech. Contrs., Garland — 430 Forest Hills Expy
17. Milton B. Levy & Son Plumbing Co. — 2538
18. Natkin and Co. — 2676 Brunner
19. Texas Distributors Inc., Box 20637

II. Electrical

1. Abright Electric Co. — 2410 Hall
2. Acklin Electric Co. — 3118 Farrington
3. Allied Electric Co. — 409 Forest Hills, Garland

2727 CEDAR SPRINGS DALLAS TEXAS 75201 TELEPHONE 214 748-0205

PLAINTIFF'S EXHIBIT No. 5A

AGREEMENT

Plumbers and Steamfitters Local Union No. 100
of the
United Association

AFL-CIO
DALLAS, TEXAS
and
Mechanical Contractors Asso. of Dallas, Tex.
ADOPTED
July 1, 1968 — July 1, 1971

• • • •

ARTICLE XIX
Working for Others

The Union further agrees that during the life of this Agreement that it will not grant or enter into any arrangement or understanding with other employer which provides for any wages less than stipulated in this Agreement as the minimum wages or for work under any more favorable term or conditions to the employer than are expressed or implied in this Agreement for less than the rate of wages indicated in this Agreement. Contractors agree not to employ any workmen subject to this Agreement for less than the rate of wages indicated in this Agreement, or under any more favorable terms and conditions than are expressed or implied in this Agreement.

Further, no workman covered by this Agreement shall bargain or contract to work for lump sum.

And further, the Union agrees that it will not furnish men to any employer not regularly engaged in the pipe trades industry as a Plumbing, Heating, Air Conditioning and/or Piping Contractor, including Rigging Contractors. This condition is not intended to cover members of the union whose regular employment is full time as maintenance men for any organization usually having such classification of employee on its payroll.

* * * *

PLAINTIFF'S EXHIBIT No. 6A

* * * *

Article XVII
Working for Others

The Union further agrees that during the life of this Agreement that it will not grant or enter into any arrangement or understanding with other employer which provides for any wages less than stipulated in this Agreement as the minimum wages for work under any more favorable term or conditions to the employer than are expressed or implied in this Agreement for less than the rate of wages indicated in this Agreement. Contractors agree not to employ any workmen subject to this Agreement for less than the rate of wages in-

dicated in this Agreement or under any more favorable terms and conditions than are expressed or implied in this Agreement.

Further, no workman covered by this Agreement shall bargain or contract to work for lump sum.

And, further, the Union agrees that it will not furnish men to any employer not regularly engaged in the pipe trades industry as a Plumbing, Heating, Air Conditioning and/or Piping Contractor, including Rigging Contractors. This condition is not intended to cover members of the union whose regular employment is full time as maintenance men for any organization usually having such classification of employee on its payroll.

* * * *

PLAINTIFF'S EXHIBIT No. 6-A

* * * *

Article XI

Arbitration

Any disputes which may arise and which cannot be settled by the authorized representatives designated by each of the parties to the dispute, shall, upon written request describing the dispute, be referred to the Joint-

Arbitration Board whose decision shall be final. The Joint Arbitration Board shall consist of three (3) members from Local Union No. 100 or Local Union No. 146 and three (3) members from the North Texas Contractors Association making a total of six (6) members.

The Joint Arbitration Board shall select its own Chairman and Secretary, and shall meet within twenty-four (24) hours after proper written notice from the President of either party.

The Joint Arbitration Board shall decide all matters coming before it by a majority vote. Four (4) members of the Board, two (2) from each of the parties hereto, shall have the right to cast the full vote of its membership, and such vote shall be counted as though all members were present and voting.

If the Joint Arbitration Board fails to agree or adjust any such matter, an umpire shall be selected by it. This umpire shall be a leading citizen of the community known for his civic-mindedness and calm judgment.

If the Joint Arbitration Board cannot agree upon an umpire, then both parties to this Agreement mutually agree to submit the dispute to the Industrial Relations Council for the Plumbing and Pipe Fitting Industry, sponsored by United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry, Mechanical Contractors Association of America, and National Association of Plumbing, Heating, and

Cooling Contractors, in accordance with the rules prescribed by the Council.

* * * *

Article XVIII

Qualifying Intent

It is not the intention of Contractor or the Union to violate any State or Federal law, and all language used in this Agreement where susceptible of more than one meaning shall be interpreted in a manner consistent with the law. If any clause, sentence, Section or Article of this Agreement shall be interpreted as being contrary to law such clause, sentence, Section or Article is automatically eliminated from this Agreement, and the remainder of the Agreement shall continue in full force and effect.

* * * *

Article XXIV

Labor Department Evidence

In an effort to assist Local 100 and Local 146 in the establishment of wage rates compatible with those contained in this Agreement, it is agreed that each Contractor signatory to this Agreement will provide to the Business Manager of Local 100 and Local 146 the following information on all work performed; the name of the project; approximate job cost; wage scale being

paid; type of work performed. This information will be provided on forms furnished by Local 100 and Local 146 and mailed to the Business Manager within a reasonable time after a contract is awarded. However, it will not be considered necessary on jobs amounting to less than $10,000.00.

Sub Contract Clause

For the sole purpose of maintaining the wages and working conditions herein provided on all work controlled by the employer party hereto, the parties hereto agree: that if the employer should sub-contract work within the scope of this agreement, such sub-contract shall require the sub-contractor to observe the minimum wage scale, classification practice and working conditions provided in this Agreement. When any part of the work included by the employer in his contract is the subject of controversy between two or more crafts he shall assign and/or perform the work in accordance with the rules of the National Joint Board for Settlement of Jurisdictional Disputes, Building and Construction Industry, or any Agency established by law to settle such dispute, such assignment or performance shall not be construed as a violation of this Agreement.

Local Union No. 100 and Local Union No. 14 agrees that if during the life of this Agreement it grants any employer any better terms or conditions than those set forth in this Agreement, such better terms and conditions shall be made available thereafter to all employers for the life of this Agreement.

• • • •

DEFENDANT'S EXHIBIT No. 1

AGREEMENT

This agreement entered into between _____ hereinafter referred to as the "Employer", and the INTERNATIONAL ASSOCIATION OF BRIDGE, STRUCTURAL AND ORNAMENTAL IRON WORKERS, AFL-CIO, of St. Louis, Missouri, hereinafter referred to as the "Association".

1. This agreement becomes effective _____, and shall continue in effect until terminated by three months' written notice from either party to the other. Changes may be made at any time by mutual consent.

2. This agreement shall be effective in all places where work is being performed or is to be performed by the Employer — or by any person, firm or corporation owned or financially controlled by the Employer, and covers all work coming under the jurisdiction of the Association.

3. The Employer recognizes the Association as the sole and exclusive bargaining representative for all employees employed on all work coming under the jurisdiction of the Association.

4. The Employer agrees not to sublet any work under the jurisdiction of the Association or its local unions — to any person, firm or corporation not in contractual relationship with this Association or its Affiliated Local Unions.

5. All employees who are members of the International Association of Bridge, Structural and Ornamental Iron Workers on the effective date of this contract shall be required to remain members of the Association in good standing as a condition of employment during the term of this contract. All employees may be required to become and remain members of the Association in good standing as a condition of employment from and after the thirty-first day following the dates of their employment, or the effective date of this contract, whichever is later.

(This clause shall be effective only in those States permitting Union Security.)

6. The Employer agrees to abide by the General Working Rules of this Association and to pay the scale of wages, work the schedule of hours and conform to the conditions of employment in force and effect in the locality in which the Employer is performing or is to perform work, provided that such conditions are not in violation of the National Labor Relations Act.

7. The Employer agrees to employ Journeymen in any territory where work is being performed or is to be performed in accordance with the Referral Plan in force and effect in the jurisdiction of the Local Union where such work is being performed or is to be performed, a sample copy of which Referral Plan is annexed hereto marked "Appendix A" and made a part hereof.

8. Any violation or annulment of the General Working Rules of the Association, or the subletting of any work coming under the jurisdiction of the Association to any person, firm or corporation not in contractual relationship with this Association or its affiliated Local Unions — will be sufficient cause for the cancellation of this agreement after the facts have been determined by the International Office of the Association.

9. In case a dispute arises which involves a question of the scale of wages or the General Working Rules of the Association, the matter shall be referred to the General President of the International Association of Bridge, Structural and Ornamental Iron Workers and he or his representative shall meet with a representative of the Employer who shall take steps at once to ascertain the facts and render a decision thereon.

Where the dispute involves a scale of wages any decision rendered shall be retroactive to the date on which the dispute originated.

In case the representative of the Employer and the representative of the Association are unable to reach an agreement on the facts in the case they may select an agency mutually agreeable to them to hear and pass upon the case in dispute.

10. Any provision of this agreement which is in contravention of any national, state or local law or governmental regulation affecting all or part of the territorial limits covered by this agreement shall be suspended in operation within the territorial limits to which such

law or regulation is applicable for the period during which such law or regulation is in effect. Such suspension shall not affect the operation of such provisions in territories covered by the agreement to which the law or regulation is not applicable, nor shall it affect the operations of the remainder of the provisions of the agreement within the territorial limits to which such law or regulation is applicable.

SIGNED FOR THE UNION
INTERNATIONAL ASSOCIATION OF
BRIDGE, STRUCTURAL
AND ORNAMENTAL IRON
WORKERS

_____

General President

_____

General Secretary

_____

SIGNED FOR THE
EMPLOYER

_____

_____

_____

DEFENDANT'S EXHIBIT No. 2

Revised: 8-20-65 No. ____ _____

ARTICLES OF AGREEMENT

THIS AGREEMENT is entered into this ____ day of _____, 197__, by and between _____, hereinafter referred to as the Employer, Developer and/or Owner-Builder, and the Building and Construction Trades Councils of Los Angeles, Long Beach, Orange County, San Bernardino and Riverside Counties, Imperial County, Ventura County, Santa Barbara County, San Luis Obispo County, and Kern, Inyo and Mono Counties of California, hereinafter referred to as the Councils.

WHEREAS, both the Employer, Developer and/or Owner-Builder have authority and control over the contracting and subcontracting of all work within the jurisdiction of the Unions affiliated with the Councils and should, therefore, assume responsibility for the compliance by their Contractors and Sub-Contractors with the provisions of the appropriate Collective Bargaining Agreements, it is agreed by the parties as follows:

I

This Agreement shall apply to and cover all building and construction work performed by the Employer, Developer and/or Owner-Builder within the jurisdiction of any Union affiliated with the Councils and the

contracting or subcontracting of work to be done at the site of the construction, alteration, painting, repair or demolition of a building, structure or other work.

II

The Employer, Developer and/or Owner-Builder agrees that all work performed within the jurisdiction of any Union affiliated with the Councils shall be performed pursuant to an executed agreement with the appropriate Union having work and territorial jurisdiction and affiliated with the Council in the area in which the work is performed.

III

The Employer, Developer and/or Owner-Builder agrees to abide by all of the terms and conditions of the current agreements of the respective crafts employed, including wages, hours, working conditions, health and welfare benefits, pension benefits, and other benefits, and further including any amendments, modifications, extensions, changes, supplements and renewals of said agreements negotiated by the parties thereto.

IV

The Employer, Developer and/or Owner-Builder agrees that he shall contract or subcontract all jobsite work set forth in Article I above to a person, firm, partnership or corporation that is party to an executed, current Agreement with the appropriate Union having

work and territorial jurisdiction, affiliated with the Council in which area the work is performed.

V

The Employer, Developer and/or Owner-Builder agrees that in the event he contracts or subcontracts any jobsite work set forth in Article I above, there shall be contained in his contract with the subcontractor a provision that the subcontractor shall be responsible for the payment of all the wages and fringe benefits provided under the Agreement with the appropriate Union affiliated with the Council. In the event that any subcontractor fails to pay the wages or fringe benefits provided under the Agreement with the appropriate Union affiliated with the Council, the Employer, Developer and/or Owner-Builder shall become liable for the payment of such sums and such sums shall immediately become due and payable by the Employer, Developer and/or Owner-Builder provided, however, he shall be notified of any such nonpayment by registered letter by the appropriate Union no later than ninety (90) days after notice of and/or completion of the entire project.

VI

The provisions of the Agreement shall be binding upon the Employer, Developer and/or Owner-Builder and upon any firm, partnership, company or corporation in which the Employer, Developer and/or Owner-Builder or any of its owners, partners, officers or stockholders has a substantial ownership interest. In the

event of any change of ownership, or in the form of the Employer's, Developer's, and/or Owner-Builder's business organization, the terms and obligations herein contained shall continue in full force and effect as to such organization.

VII

It is mutually agreed that any provision in the agreements of the respective crafts covering or relating to the subjects of Strikes, Lockouts, Procedure for Settlement of Grievances and Disputes, the Selection and Functioning of Tribunals for Arbitration, and the Settlement of Jurisdictional Disputes shall not be in effect or binding upon the Employer, Developer and/or Owner-Builder and the Councils and the respective craft Unions, nor incorporated in these Articles of Agreement by reference or otherwise, except as herein provided.

VIII

In the event a jurisdictional dispute arises which is not resolved by the Unions themselves locally, the matter shall be determined in the manner and by the procedure established by the National Joint Board for the Settlement of Jurisdictional Disputes, or in the event the National Joint Board for the Settlement of Jurisdictional Disputes is abolished, the Procedure established by the Building and Construction Trades Department shall prevail.

IX

In the event that the Employer, Developer and/or Owner-Builder violates any provision of this Agreement with the exception of Article IV above, or fails to abide by the determination as provided in Article VIII or in the event that any contractor or subcontractor of the Employer, Developer and/or Owner-Builder fails to abide by the provisions of the appropriate agreement, with the exception of any subcontracting clause contained in the appropriate agreement of the subcontractor, it will not be a violation of this Agreement for the Councils to terminate this Agreement and it shall not be a violation of this Agreement for any employee to refuse to perform any work or enter upon the premises of such Employer, Developer and/or Owner-Builder, to the extent permitted by law, and Employees who refuse to perform any work or enter upon the premises under the circumstances shall not be subject to discharge or any other disciplinary action, to the extent permitted by law.

The Employer, Developer and/or Owner-Builder further agrees that on all of his jobs he, all of his contractors and subcontractors will abide by all local, State and Federal health, safety and sanitary regulations, and in the event that there are any conditions which may be or tend to be detrimental to the employees' health, safety, morals, or reputation, it is agreed that the employees shall not be required to work under such conditions. It is further agreed that no employee shall be required to cross any lawful primary picket line or enter any premises at which there is a lawful

primary picket line authorized or approved by the Councils, individually or collectively, or authorized by any Central Labor Body in the area covered by this Agreement. The Employer, Developer and/or Owner-Builder agrees that he will not assign or require any employee covered by this Agreement to perform any work or enter premises under any of the circumstances above described at which there is a lawful primary picket line.

During the time of any violation of any of the provisions of this Agreement by the Employer, Developer and/or Owner-Builder, contractor or subcontractor, whether created by their executed, current agreements or otherwise, the affiliated Unions shall be released and relieved of any obligation to furnish workmen to any of them.

X

If any of the provisions of this Agreement shall be held invalid by operation of law or by any tribunal of competent jurisdiction, the remainder of this Agreement shall not be affected thereby and shall remain in full force and effect.

XI

No Employer, Developer and/or Owner-Builder or representative of any Council or Craft is authorized in any manner to modify, amend or alter this Agreement in any respect without the approval of all of the Councils, parties to this Agreement.

XII

This Agreement shall become effective at the date hereof and shall remain in full force and effect for one (1) year from said date and from year to year thereafter, provided, however that either party may give sixty (60) days written notice prior to each anniversary date, to the other party of its desire to terminate this Agreement.

The Councils recommend that the Employer, Developer and/or Owner-Builder when starting the construction of a project in one of the above-named Counties, other than the one in which he has customarily employed workmen or engages subcontractors, contact should be made with the Secretary of the Building and Construction Trades Council having jurisdiction. For this purpose Council Secretaries in each area covered by this Agreement are listed.

LOS ANGELES
1626 Beverly Blvd., Los Angeles
J. A. Cinquemani

LONG BEACH
1231 Locust Ave., Long Beach
C. B. Gariss

IMPERIAL
P. O. Box 625, El Centro
Kenneth R. Johnson

RIVERSIDE-SAN BERNARDINO
1074 La Cadena Dr., Riverside
Edwin P. Westmoreland

ORANGE
1532 E. Chestnut St., Santa Ana
Thomas W. Mathew

VENTURA
2641 Loma Vista Rd., Ventura
Victor F. Rose

SANTA BARBARA
417 Chapala St., Santa Barbara
Bill Fillippini

SAN LUIS OBISPO
1530 Monterey Street, San Luis Obispo
Harold L. Boyle

KERN-INYO-MONO
214 Bernard St., Bakersfield
H. D. Lackey

BUILDING AND CONSTRUCTION
TRADES COUNCIL OF
LOS ANGELES

_____
(City or County)

_____
(Signature of Council Secretary)

SUBMITTED BY:

_____
Business Representative

_____
Craft and Local Number

EMPLOYER, DEVELOPER
and/or OWNER-BUILDER

_____
(Print exactly as listed in
State License Bk.)
By _____
(Written signature of qualified
official)
State Address _____
City _____ Zip _____
Telephone _____
Classification _____
State License Number _____

DEFENDANT'S EXHIBIT No. 8

Kas Construction Company
318 East Main Street
Richardson, Texas 75080

Gentlemen:

This Local is engaged in a continuing effort to improve and protect the wages and work opportunities of those it represents through lawful and legitimate means. In this connection the enclosed contract has been prepared and is tendered to you with the request that you execute and return it to this Local.

The contract was drafted to conform to the provisions of Section 8 (e) of the Labor-Management Relations Act. Should you have any doubt as to its legality, please advise us promptly.

We hope that you will see fit to execute the enclosed contract. In the event you decide not to become a party to this agreement we would appreciate your early advice. Should we have not heard from you by Monday, April 13, 1970, we will interpret your silence as a rejection. In the event you should refuse to sign the enclosed contract, it is our intention to employ the lawful means available to us to protest this refusal.

By this proposed contract we do not seek for you to terminate any existing contractual or business relationship, or do we seek to force or require your firm to recognize or bargain with this organization, and we do not seek to organize your employees. Our sole pur-

pose in proposing the enclosed contract and any efforts that may in the future be made to obtain such contract are those purposes made lawful by Congress in the enactment of Section 8 (e) of the Labor-Management Relations Act.

Be assured that all activities by this Local to secure and/or enforce this contract will be in strict compliance with state and federal law. Should you ever have information to the contrary, please advise the undersigned promptly, so that any necessary steps can be taken to insure that there are no violations of the law. We shall appreciate your consideration of this request.

Sincerely,

Alva B. Patterson
Business Agent
Plumbers & Steamfitters
Local Union No. 100

DEFENDANT'S EXHIBIT No. 9

AGREEMENT

This Agreement entered into this _____ day of _____, 1968, by and between the signatory contractor, hereinafter referred to as Contractor, and Local Union No. 100 of the United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry hereinafter referred to as Union,

WITNESSETH

WHEREAS, the contractor and the union are engaged in the construction industry, and

WHEREAS, the contractor and the union desire to make an agreement applying in the event of subcontracting in accordance with Section 8 (e) of the Labor-Management Relations Act;

WHEREAS, it is understood that by this agreement the contractor does not grant, nor does the union seek, recognition as the collective bargaining representative of any employees of the signatory contractor; and

WHEREAS, it is further understood that the sub-contracting limitation provided herein applies only to mechanical work which the contractor does not perform with his own employees but uniformly subcontracts to other firms;

THEREFORE, the contractor and the union mutually agree with respect to work falling within the scope of this agreement that is to be done at the site of construction, alteration, painting or repair of any building, structure, or other works, that if the contractor should contract or subcontract any of the aforesaid work falling within the normal trade jurisdiction of the union, said contractor shall contract or subcontract such work only to firms that are parties to an executed, current collective bargaining agreement with Local

Union 100 of the United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry.

_____

Union

_____

Contractor

_____

DEFENDANT'S EXHIBIT No. 10

NATIONAL LABOR RELATIONS BOARD
REGION 16
Room 8A24, Federal Office Building, 819 Taylor Street
Fort Worth, Texas 76102

May 21, 1970

Michael J. Kuper, Esquire
Schoolfield & Smith
1200 Republic Bank Building
Dallas, Texas 75225

Re: Plumbers & Steamfitters
Local Union No. 100 (K.A.S.
Construction Co.)
Case No. 16-CC-363

Dear Mr. Kuper:

The above-captioned case charging a violation under Section 8 of the National Labor Relations Act, as a-

mended, has been carefully investigated and considered.

As a result of the investigation, it appears that because there is insufficient evidence of violation, further proceedings are not warranted at this time. More particularly, the investigation disclosed that the union was picketing to obtain the subcontracting clause in question and was not violative of 8(b)(4)(A) nor was there sufficient evidence of a secondary objective to warrant issuance of complaint under Section 8(b)(4)(B) of the Act. I am, therefore, refusing to issue complaint in this matter.

Pursuant to the National Labor Relations Board Rules and Regulations, you may obtain a review of this action by filing an appeal with the General Counsel of the National Labor Relations Board, Washington, D.C., 20570, and a copy with me. This appeal must contain a complete statement setting forth facts and reasons upon which it is based. The appeal must be received by the General Counsel in Washington, D.C., by the close of business on *June 3, 1970*. Upon good cause shown, however, the General Counsel may grant special permission for a longer period within which to file. Any such request for a longer period of time must

be made prior to June 3, 1970. A copy of any such request for extension of time should be submitted to me.

Sincerely yours,

Elmer Davis
Regional Director

May 25, 1970

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

DEFENDANT'S EXHIBIT No. 11

NATIONAL LABOR RELATIONS BOARD
OFFICE OF THE GENERAL COUNSEL
Washington, D.C. 20570

Re: Plumbers & Steamfitters
Local Union No. 100 (K.A.S.
Construction Co.)
Case No. 16-CC-363

Michael Jay Kuper, Esq.
Schoolfield and Smith
1200 Republic National Bank Building
Dallas, Texas 75201

Dear Mr. Kuper:

Your appeal in the above matter has been duly considered.

The appeal is denied. Under all the circumstances, inasmuch as the contract clause sought by the Union was not unlawful on its face, the picketing for it would not, without more, violate the Act. *Northeastern Indiana Bldg. Constr. Trades, et al* (Centlivre Village Apts.), 148 NLRB 854; *Los Angeles Building and Construction Trades Council* (Church's Fried Chicken), 183 NLRB No. 102, slip opin., p. 11. There was no evidence that the Union had sought a cessation of business between K.A.S. and its plumbing subcontractor, and the picketing began four days before the plumbing subcontractor began on the job. *Local 437, IBEW* (Dimeo Construction Company), 180 NLRB No. 32, cited in the appeal, is inapposite in that the clause in that case was one prohibited by 8(e).

Very truly yours,

Arnold Ordman
General Counsel

(Signed) IRVING M. HERMAN
Irving M. Herman
Director, Office of Appeals

SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1973

No. 73-1256

CONNELL CONSTRUCTION COMPANY, INC.,
Petitioner,

versus

PLUMBERS AND STEAMFITTERS LOCAL UNION NO. 100, etc.,
Respondent.

ORDER ALLOWING CERTIORARI
May 13, 1974

The Petition for a Writ of Certiorari is GRANTED.

No. 73-1256

Supreme Court of the United States

OCTOBER TERM, 1973

CONNELL CONSTRUCTION COMPANY, INC.,
Petitioner,

vs.

PLUMBERS AND STEAMFITTERS LOCAL UNION NO. 100 OF UNITED ASSOCIATION OF JOURNEYMEN AND APPRENTICES OF THE PLUMBING AND PIPEFITTING INDUSTRY OF THE UNITED STATES AND CANADA, AFL-CIO,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF IN OPPOSITION FOR RESPONDENT

DAVID R. RICHARDS
600 West 7th Street
Austin, Texas 78701
Counsel for Respondent

Of Counsel:
CLINTON & RICHARDS
600 West 7th Street
Austin, Texas 78701

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-1256

CONNELL CONSTRUCTION COMPANY, INC.,
Petitioner,

vs.

PLUMBERS AND STEAMFITTERS LOCAL UNION No. 100 OF UNITED ASSOCIATION OF JOURNEYMEN AND APPRENTICES OF THE PLUMBING AND PIPEFITTING INDUSTRY OF THE UNITED STATES AND CANADA, AFL-CIO,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF IN OPPOSITION FOR RESPONDENT

The opinions below, the basis of this Court's jurisdiction, and the statutory provisions involved are set out at pp. 1-3 and A1-D4 of the Petition.

QUESTIONS PRESENTED

1. Whether in this labor anti-trust case the court below was correct in affirming a judgment for the Union on the ground that on the record and pleadings here the Plaintiff-Company "made out no sufficient claim of conspiracy to get beyond the union's antitrust exemption," (Pet. App. B-25).

2. Whether the court below, having determined that regardless of the construction given to the proviso to § 8(e) of the National Labor Relations Act, the Plaintiff-Company could not make out its antitrust case, was correct in declining to pass on the validity of the Union's actions under that proviso.

3. Whether the court below was correct in holding that since the subject matter of this suit is regulated by the National Labor Relations Act, the Plaintiff-Company's claims under state antitrust laws are preempted.

ARGUMENT[1]

In this labor antitrust case, the court below concluded that "Connell [the plaintiff in the trial court] has made out no sufficient claim of conspiracy to get beyond the union's antitrust exemption," (Pet. App. B-25). The conclusion that Connell failed to prove its case followed a meticulous review of this Court's most recent relevant authorities (*Mine Workers* v. *Pennington*, 381 U.S. 657, *Meat Cutters* v. *Jewel Tea Co.*, 381 U.S. 676, and *Musicians* v. *Carroll*, 391 U.S. 99), all of which the Court of Appeals read so as to give Connell the widest latitude in its effort to establish a violation, (Pet. App. B-7-21).[2] There is no

[1] The Petition's Statement of the Case (Pet. 3-7) follows that of the Court of Appeals (Pet. App. B-2-4). We therefore do not restate the facts.

[2] In contrast, the dissent is a construct to which Judge Clark was "guided by [his] own reason," (Pet. App. B-56), and whose result was a rule which he reluctantly acknowledged "bears a superficial resemblance to *Duplex Printing Co.* v. *Deering*, 254 U.S. 443," (Pet. App. B-57 n. 11), even though, as he further acknowledged, that authority no longer has any vitality in the antitrust area.

conflict among the circuits; and, indeed, the result reached below is consistent with that reached in the only other case arising in a similar context, *Suburban Tile Center* v. *Rockford Building Trades Council*, 354 F.2d 1 (C.A. 7), *cert. denied* 384 U.S. 960. Finally, the Court of Appeals made it clear that its decision was predicated not only on Connell's failure to prove an antitrust violation, but also on its further failure to pursue the proper course open to it in this "patently • • • labor law, not an antitrust, controversy" (Pet. App. B-39), *viz.*, the filing of a charge with the National Labor Relations Board or of a suit in court predicated on § 303 of the Taft-Hartley Act. Thus, the decision below does not settle the question of whether the Union's actions challenged here were lawful, but only whether they were forbidden by the antitrust laws. This petition is, therefore, a last ditch attempt to retrieve a litigation error. It should be denied.

1 (a). The Court of Appeals read *Pennington* and *Jewel Tea* as stating the following two-fold test:

> "[W]herever the complaint alleges a conspiracy between labor and non-labor groups to injure the business of another non-labor group the [labor antitrust] exemption is not available. Justice White's opinion in *Jewel Tea* suggests that even where there is no allegation of conspiracy the union cannot claim exemption from the antitrust laws if the agreement it seeks does not encompass a 'legitimate union interest'." (Pet. App. B-21.)

So far as we are aware, no court has given those authorities a wider reach.

The Court of Appeals noted that in order to meet the

requirements of the first branch of the foregoing test, a plaintiff must "prove facts showing that the union conspired with certain business interests to create a monopoly for such business interests," (Pet. App. B-23). This Connell had failed to do:

> "The complaint of Connell in this case contains no allegation of this union's participation in a scheme or conspiracy with a non-labor group to create a monopoly for that non-labor group. In fact, Connell bases its claim on the ground that this contract simply restricts the way in which it is free to carry out its business.
>
> • • • •
>
> "Such a conspiracy allegation is clearly not the kind which faced the Supreme Court in *Pennington* and the other antitrust conspiracy cases. The only non-labor group with which the union is alleged to have "conspired" is the very party who now tries to bring the antitrust suit alleging serious injury. This seems to be strong evidence that at least with regard to the contract with Connell, the union was acting in its own self-interest and that no monopoly was being formed with Connell, the only non-labor group with whom the union is alleged to have 'conspired.' • • • We are thus left with a situation quite similar to *Jewel Tea* in that, once the conspiracy to monopolize drops out, the only remaining claim of plaintiff is that the agreement interferes with his right to conduct his business as he wishes and that the contract requires him to forego certain methods of competition." (Pet. App. B-23-25.)

In short, the holding below is not that a claim such as that presented here can never result in union antitrust liability, but that Connell simply did not prove its case.

This Court does not sit to review judgments which turn on the particular facts and pleadings in a particular record.

(b). The Court of Appeals next considered the question:

> "Is the union in this case seeking an agreement involving a legitimate union interest? We feel it clearly is. • • • The Plumbers' union is simply seeking to eliminate competition based on differences in labor standards and wages." (Pet. App. B-28.)

As the court below appreciated, pursuit of that object has been recognized to be outside the prohibitions of the antitrust laws at least since *Apex Hosiery* v. *Leader*, 310 U.S. 469, 503-504. And the Union's method of seeking to protect that interest here was more direct than those sanctioned by this Court in *Jewel Tea* and *Musicians* v. *Carroll:*

> "In *Jewel Tea*, Justice White's group found that the hours of marketing meat—even pre-cut meat—was a legitimate concern for the butchers' union that allows restriction on use of a competitive device which is obviously only remotely related to a union's primary aim. The agreement the union sought from Connell, however, is directly related to work attainment, work preservation, and other labor standards which directly benefit the members of the union involved. Just as in *Jewel*, the aims of the union in *American Federation of Musicians* were not nearly as related to direct union benefit as are the terms sought from Connell; yet in each of those cases the Supreme Court found that the terms of the agreement sought were sufficiently related to the elimination of competition based on wage and standard differences that the antitrust exemption was available.

"Even if the anticompetitive aspects are weighed against the direct benefit as Justice White suggests they should be in his *Jewel Tea* opinion and *American Federation of Musicians* dissent, it would be difficult to find these goals illegitimate. First, it is clear that in section 8(e) Congress explicitly recognized the legitimacy of these restrictions on subcontractors wherever the general contractor had unionized employees of his own. The *anticompetitive* effect does not change that much where the general contractor has no employees of his own. Of course, the situation may differ when all general contractors have agreed. However, it still remains that the only anticompetitive aspect is that the unions have succeeded in eliminating that feature of competition based on lower standards or wages. There remain numerous other competitive devices." (Pet. App. B-31-32; emphasis in original.)

(c). The construction industry proviso to § 8(e) of the NLRA, referred to by the Court of Appeals in the foregoing passage, is relevant in two additional respects. First, the Union has contended throughout that its actions in this case are protected by that proviso. There is NLRB authority supporting that contention. See *Orange Belt District Council of Painters* v. *NLRB*, 328 F.2d 534 (C.A.D.C.);[3] *Los Angeles Building Trades Council (Church's Fried Chicken, Inc.)*, 183 NLRB No. 102, 74 LRRM 1669. And, if the Union is correct on this issue (which the court below did not decide), the antitrust conclusion that follows is that stated by the Seventh Circuit in *Suburban Tile Center, Inc., supra*, 354 F.2d at 3:

[3] The context in *Orange Belt* was parallel to that here. See the Board opinion on remand, 153 NLRB 1196, 1199, *enforced*, 365 F.2d 540 (C.A.D.C.).

"A construction subcontracting agreement has been held to be a mandatory subject of collective bargaining. *Orange Belt District Council of Painters No. 48, AFL-CIO* v. *N.L.R.B.*, 1964, 117 U.S.App.D.C. 233, 328 F.2d 534, 537; *Building and Construction Trades Council of San Bernardino & Riverside Counties* v. *N.L.R.B.*, 1964, 117 U.S.App.D.C. 239, 328 F.2d 540. Economic action to secure such agreements has been allowed. *Essex County and Vicinity District Council of Carpenters etc.* v. *N.L.R.B.*, 3 Cir., 1964, 332 F.2d 636, 641; *Construction, Production & Maintenance Laborers Union, Local 383, AFL-CIO* v. *N.L.R.B.*, 9 Cir., 1963, 323 F.2d 422, 425. In the face of these decisions, it would be unreasonable to hold that success in securing such an agreement constitutes a violation of the anti-trust laws."

Second, as the court below stated, if the Union is incorrect and if the § 8(e) proviso does not apply, "it would seem unquestionable that the union is committing an unfair labor practice under" Section 8(b)(4)(ii)(B), (Pet. App. B-42). Thus, the conclusion that Connell does not have an anti-trust remedy does not lead to the conclusion that it has no remedy at all. If there has been a wrong, the Company does have a right to a cease and desist order from the Board under § 8(b)(4), and a right to damages from the courts under § 303. As the Court of Appeals stated:

"[W]e have concluded that on the basis of the allegations presented in this suit, there is no cause of action for Connell in antitrust. As our opinion illustrates, we do not feel we have jurisdiction to directly decide the complex labor issues underlying this dispute. We feel that if Connell desires adjudication of these matters there are adequate methods for securing such a

determination without resorting to a possible warping of the antitrust laws." (Pet. App. B-47.)

Thus, the catastrophic consequences for employers which Petitioner and its *amici* predict from the result reached below are nothing more than an effort to contrive unwarranted importance to this case.[4]

2. What has been shown thus far demonstrates that the question emphasized in the petition is without substance. We now show that the remaining two questions asserted are equally insubstantial.

First, Connell requests this Court to treat with its contention that the proviso to § 8(e) of the NLRA does not protect union action to secure a subcontracting clause from an employer in the construction industry who does not himself employ the class of craftsmen that would be covered thereby. (Pet. 2, 20.) Since the scope of the proviso has no bearing on Connell's antitrust claim, the court below properly declined to reach out for that additional issue. (Pet. App. B-47.) Indeed, the Court of Appeals was scrupulous to distinguish between the anti-trust issues which were raised

[4] For that reason, the petition's attempt to r argue the *National Woodwork* case, 386 U.S. 612, is bootless. It is preposterous to assert that this Court there held "that a *primary* subcontracting clause *in a collective bargaining agreement* was protected by the proviso to Section 8(e)," (Pet. p. 16, emphasis in original.). Since the conduct in *National Woodwork* was primary, the proviso which protects secondary activity did not come into play. The further contention that if unions, acting alone, conduct secondary boycotts prohibited by labor law they "are not exempt from the Sherman Act" (Pet. p. 17), admittedly relies on *Duplex v. Deering*, 254 U.S. 433, which for antitrust purposes was overruled in *U.S. v. Hutcheson*, 312 U.S. 219.

by Connell's complaint, and to avoid the labor law issues which might have been raised in that complaint, but were not. (Pet. App. B-39-47.)

Second, Connell also argues that the Court of Appeals was wrong in refusing to consider its claims under state antitrust laws. (Pet. 17-18.) The court below stated:

> "After careful consideration, we hold that state antitrust laws cannot be applied to this activity because of preemption by federal law. We note here that Connell has argued that the federal antitrust statutes do not necessarily preempt application of state antitrust statutes. However, it is not the federal statutes pertaining to antitrust which we feel are controlling here. Rather, as we have previously pointed out, the dispute in this case is unquestionably a labor law issue. It is the body of federal labor law, primarily enunciated in the National Labor Relations Act, which we feel preempts the possible application of state antitrust remedies to this situation." (Pet. App. B-47.)

This holding is unquestionably correct under *Weber* v. *Anheuser-Busch*, 348 U.S. 464, which held an action under a state anti-trust law (*id.* at 472), to be preempted where the allegedly unlawful picketing was either protected or a violation of the secondary boycott or jurisdictional dispute

prohibitions of §§ 8(b)(4) and 303 of the NLRA. See also *Teamsters Union* v. *Oliver*, 358 U.S. 283, 297.[5]

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

DAVID R. RICHARDS
600 West 7th Street
Austin, Texas 78701
Counsel for Respondent

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[5] Petitioner attempts to inject into the case the question of whether a "most favored nations clause" violates the antitrust laws. (Pet. 8-10.) No such claim was made in the complaint or at trial, where Connell argued that the alleged antitrust violation resulted solely from the agreement sought by the Union under which Petitioner "would no longer do business with any plumber or mechanical firm which did not have a contract with Local 100." (Court of Appeals App. 48.) Its claim of an antitrust violation was thus based solely on the subcontracting agreement which it signed, and that agreement did not contain a "most favored nations clause." (Pet. App. D-1.)

Supreme Court, U.S.
JUL 18 1974
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-1256

CONNELL CONSTRUCTION COMPANY, INC.,
Petitioner,

versus

PLUMBERS AND STEAMFITTERS LOCAL UNION No. 100, etc.,
Respondent.

PETITIONER'S BRIEF ON THE MERITS ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1973

No. 73-1256

CONNELL CONSTRUCTION COMPANY, INC.,
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PLUMBERS AND STEAMFITTERS LOCAL UNION
No. 100, etc.,
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PETITIONER'S BRIEF ON THE MERITS ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

OPINIONS BELOW

The findings of fact and conclusions of law in the District Court (A. 34-42) are reported at 78 LRRM 3012 (N.D. Tex. 1971). The opinion of the Court of Appeals is reported at 483 F.2d 1154 (5th Cir. 1973), and is repoduced as Appendix B (pp. B-1-B65), to the Petition for Certiorari.

JURISDICTION

The Judgment and Opinion of the Court of Appeals, with Judge Clark dissenting, was entered on August 22,

1973. Petitioner made timely Motion for rehearing *en banc*, which Motion was denied by Order of the Court of Appeals on November 19, 1973 (Pet. App. B-66). The Petition for Writ of Certiorari was filed with this Court February 14, 1974, and was granted on May 13, 1974 (A. 144). The jurisdiction of this Court is vested by 18 USC §1254(1).

FEDERAL AND STATE STATUTES INVOLVED

(Reproduced in the Appendix to this Brief)

The Federal Statutes involved are as follows:

1. Sherman Anti-Trust Act (15 USC §1);
2. Clayton Act, Sections 6 and 20 (15 USC §17 and 29 USC §52);
3. National Labor Relations Act [29 USC §151, et seq., Section 7, 8(b)(4) and 8(e)]
4. Norris-LaGuardia Act (29 USC §101, et seq., Sections 1, 2 and 4);
5. Federal Declaratory Judgment Act, (28 USC §2201).

The State Statutes involved are as follows:

1. Vernon's Texas Codes Annotated, Business and Commerce Codes, Sections 15.02, 15.03 and 15.04.

QUESTIONS PRESENTED

I.

Whether an agreement in restraint of trade between a union and a general contractor in the construction industry which requires the general contractor to refuse to do business with, and to boycott any business entity unless such entity is a party to an exclusive form of collective bargaining agreement with that union, violates the Sherman Anti-Trust Act and/or the anti-trust laws of the State of Texas in the absence of a collective bargaining relationship between such trade union and general contractor.

II.

Whether a federal court should adjudicate questions of the National Labor Relations Act when such questions arise in the context of, and are vital to, determinations of violations of the federal and/or state anti-trust laws.

III.

Whether an agreement in restraint of trade obtained from a general contractor by a union is protected by the National Labor Relations Act and/or constitutes legitimate union interest if the agreement, its procurement and maintenance, are not addressed to the labor relations of the general contractor *vis-a-vis* his own employees and/or the agreement is obtained by coercion.

STATEMENT OF THE CASE

A. Facts of Controversy.

Petitioner, hereinafter referred to as "CONNELL", is a general contractor engaged in the construction business in Dallas, Texas. CONNELL has collective bargaining agreements with various construction trade unions

which represent its craft employees (A. 53). CONNELL does not, however, and never has, employed anyone engaged in plumbing or similar work. Respondent has at all times been a "stranger union" to CONNELL and its employees. CONNELL obtains its work by negotiations or on a competitive bid basis and, in turn, selects subcontractors for plumbing and mechanical equipment, materials and labor on a competitive bid basis (A. 51). Prior to the events which resulted in this case, CONNELL had done business for many years with both union and non-union plumbing and mechanical subcontractors. (A. 53, 55).

Plumbers and Steamfitters Local Union No. 100, Respondent hereinafter referred to as "UNION", represents its members with various mechanical and plumbing firms in the North Texas area. UNION negotiated a Master Area-Wide Collective Bargaining Agreement with a multi-employer association consisting of the largest unionized plumbing and mechanical construction firms in the North Texas area in 1968 and in 1971. Article XIX of the 1968 and Article XVII of the 1971 Master Area-Wide collective bargaining agreements provide that UNION will not enter into any form of collective bargaining agreement for lesser wages or working conditions than those contained in the Master Agreement (Pl. Exs. 5A; A. 118 and 6A; A. 119).

In late 1970, UNION demanded that CONNEL enter into an agreement with it whereby CONNELL would agree not to do any business with plumbing and mechanical firms unless such firms were parties to "an executed current collective bargaining agreement" with UNION. UNION sent its proposed agreement (Pl. Ex. 3;

A. 59, 112-113)[1] to CONNELL with a letter indicating that UNION would picket CONNELL'S construction projects unless CONNELL signed the agreement within ten (10) days (Pl. Ex. 2; A. 110-112). When CONNELL failed to sign the proposed agreement, UNION commenced picketing the Bruton Venture construction project on which CONNELL was general contractor for the admitted purpose of forcing CONNELL to sign the proposed agreement, foreclosing CONNELL'S ever doing business with any plumbing or mechanical subcontractors unless they had collective bargaining agreements with UNION (A. 22, 82). UNION did not represent, nor seek to represent, a single employee of CONNELL.

At the time such picketing commenced, approximately 150 union employees of CONNELL and its various subcontractors left the jobsite, bringing to a halt all work progress (A. 61). CONNELL'S plumbing subcontractor on the picketed project had a collective bargaining agreement with UNION (A. 82). The picketing continued until a Temporary Restraining Order was issued against UNION by the 134th District Court of Dallas County, Texas on CONNELL'S Petition in that Court, alleging that the subject agreement and the picketing for same were volative of the anti-trust laws of the State of Texas (A. 3-17). UNION successfully removed the case to the United States District Court for the Northern District of Texas, alleging in its Petition for Removal that various sections of the National Labor Relations Act, hereinafter referred to as "NLRA", controlled the controversy over the subject agreement. After that Court refused to remand the case to

1 The proposed agreement is also reproduced in the Opinion of the Court of Appeals at 483 F.2d. 1156; Pet. App. B-2. As used in this brief, the terms "proposed agreement" and "subject agreement" refer to this agreement and not to a collective bargaining agreement.

State Court, CONNELL, under threat of further picketing by UNION (A. 63), entered into the agreement, under protest (Pl. Ex. 4; A. 62, 114-116).

CONNELL then amended its pleadings in the United States District Court seeking a Declaratory Judgment pursuant to 28 USC §2201, that the subject agreement with UNION violated the Sherman Anti-Trust Act, 15 USC §1, as well as the anti-trust laws of Texas (A. 25-34). UNION filed a counterclaim seeking a Declaratory Judgment that the agreement was legal and was protected by Section 8(e) of the NLRA (29 USC §158-e), (A. 24).

During the trial of the case the following additional facts were established:

1. CONNELL has, prior to entering into the subject agreement with UNION, awarded contracts for the mechanical portions of a project by competitive bids, without regard to the labor relations policy of the mechanical or plumbing firms (A. 51-54;68).

2. That on approximately 50% to 60% of the construction projects CONNELL bids, the architect specifies acceptable mechanical subcontractors for the project, usually specifying both open shop and union companies (A. 64-67).

3. That for twenty-four (24) years, CONNELL has done business on a regular and continuing basis with twelve (12) non-union

mechanical firms as well as with twelve (12) union firms (A. 55-56).

4. That CONNELL has lost construction jobs since entering into the subject agreement with UNION, and on two of those projects, Texas Distributors, a non-union firm with which CONNELL had done business for over ten (10) years (A. 68, 108), made the most competitive bids (A. 65-67).

5. That at the time of trial, UNION had sent the same or similar agreements as it sought from CONNELL to forty-five (45) other general contractors and had obtained the written agreement of five (5) other general contractors; had picketed some general contractor for a similar agreement the week before the trial (A. 77-78); and had been picketing various general contractors for the past three years to obtain an agreement similar to the one involved herein (A. 84).

6. That there was an exclusive form of collective bargaining agreement to which UNION was a party, from which UNION would not deviate, and CONNELL was restricted by the agreement (P. Ex. 4), from doing business with any mechanical company not a party to the exclusive form of collective bargaining agreement with UNION (A. 73-77).

7. That the General Counsel of the National Labor Relations Board had refused to issue a

> Complaint under the NLRA involving the same agreement entered into by KAS Construction Company prior to the time UNION picketed CONNELL for the agreement (D. Ex. 10; A. 141).

In addition to the above, counsel for CONNELL and UNION entered into Stipulations of Fact covering certain facts of the case (A. 106-110).

B. Decision of the United States District Court.

After the trial of the case before the Federal District Court, Judge Sarah T. Hughes issued Findings of Fact and Conclusions of Law on November 9, 1971 (A. 34-42), Judgment being entered in the case on November 18, 1971 (A. 43). Although Judge Hughes did not make findings on all pertinent facts, those she made are correct and are supported by the evidence. The District Judge held that the agreement in question was protected by the construction industry proviso to Section 8(e) of the NLRA and that it was therefore exempt from federal and/or state antitrust laws (A. 39-43). No decision was made by the District Court on the merits of the federal or state antitrust issues of the case.

C. Decision of the Court of Appeals.

The Court of Appeals, with Judge Clark dissenting, rendered a sixty-five (65) page opinion affirming the Judgment of the District Court (Pet.App. B-1; 483 F.2d. 1154). The majority opinion of the Court of Appeals held that the activities of UNION and the questioned agreement were immune from the federal anti-trust laws and that the anti-trust laws of the State of Texas were

preempted by federal labor law. The majority panel failed to find an illegal conspiracy on the grounds that CONNELL was the sole "non-labor" party to the questioned agreement (Pet. App. B-23). However the majority of the Court refused to decide whether the questioned agreement was violative of, or protected by, the NLRA, even though the District Court had previously found the agreement to be protected solely by Section 8(e) of the Act. The Court of Appeals acknowledged that the General Counsel of the National Labor Relations Board had refused to issue a Complaint in a case involving picketing by UNION to obtain the exact agreement from another general contractor (Pet. App. B-6 and B-45) in Dallas, Texas, and strongly urged that the National Labor Relations Board, hereinafter referred to as "NLRB", decide the labor issues of the questioned agreement at the "next available opportunity".[2] However; the Court majority refused to pass on the labor issues though they are inextricably entwined with the anti-trust questions in this case and UNION'S only defense to the anti-trust allegations of CONNELL

2 The majority of the Fifth Circuit Court stated:

> "We feel quite strongly that the Board should take and consider this issue fully at the next available opportunity. Its resolution will have significant impact on labor relations in the construction industry. Repeated attempts by an administrative body to avoid resolution of a difficult issue may constitute an abuse of discretion." (Pet.App. B-40)

The General Counsel for the NLRB continued to refuse to issue Complaints in three cases pending with him involving identical agreements prior to the Fifth Circuit's opinion and in one filed with the NLRB since the Court's decision. Since the filing of the Petition for Certiorari herein, he has issued a twenty-three page decision refusing to issue Complaints in these cases arising under the NLRA over similar agreements, thereby foreclosing the possibility of the NLRB deciding the 8(e) proviso question left open by the majority opinion of the Court of Appeals as discussed *infra*. *Ponsford Bros.*, NLRB Case Nos. 28-CC-417, 28-CC-431, 28 CE-12; *Hagler Construction Co.*, 16-CC-447; *Howard U. Freeman, Inc.*, 16-CC-472 and 477; *Columbus Building and Construction Trades Council*, 9-CC-706-1 through -20.

has been the construction industry proviso to Section 8(e) of the NLRA.

SUMMARY OF ARGUMENT

This case involves violations of the Sherman Act by UNION'S forcing CONNELL to boycott and refuse to do business with any plumbing or mechanical firms which do not have collective bargaining agreements with it. UNION will enter into only one form of collective bargaining agreement, being the exact agreement it entered into with a multi-employer association consisting of the largest unionized mechanical and plumbing contractors within the relevant market area. The form is different, but the results of the subject agreement are the same as those previously condemned by this Court under the Sherman Act. The subject agreement restricts competition, artifically inflates construction costs, and restricts trade in interstate commerce. There is no work preservation or other legitimate labor interests involved in the subject agreement, and there is no collective bargaining relationship between CONNELL and UNION.

The subject agreement is the result of "conspiracy" or "combination" between CONNELL and UNION to restrain trade. The effects of the agreement make a mockery of the NLRA to the point that it represents no "legitimate labor interest", therefore, UNION is not immune from the proscriptions of the Sherman Act herein.

UNION'S sole defense to the anti-trust allegations of CONNELL has been that the construction industry proviso to Section 8(e) of the NLRA protects both the

agreement and UNION'S coercion of CONNELL to obtain it. The legislative history to the §8(e) proviso clearly reveals that Congress only intended to allow voluntary agreements and those made within the collective bargaining framework. The Court of Appeals refused to decide any of the labor law questions involved in this case, including the reach of the §8(e) proviso. The NLRB General Counsel has consistently refused to process charges of NLRA violations involving the subject agreement.

Neither the Court of Appeals nor the Federal District Court considered the State Anti-Trust issues involved in this case, both of them routinely applying the Preemption Doctrine. The subject agreement between UNION and CONNELL violates the Texas Anti-Trust Laws as well as the Sherman Act.

The proper decision in this case requires a balancing of the federal anti-trust policy, favoring competition, with the federal labor policy, which protects the rights of employees to engage in or refrain from union activities and the rights of employers to be free from disputes not their own. Also, the methodical application of the Federal Preemption Doctrine should be closely examined herein.

Finally, the Court should hold that federal courts have jurisdiction to decide labor law questions arising in anti-trust cases, especially when no relief can be obtained from the NLRB.

It is respectfully suggested, as shown in the following Argument, that this Court should find the subject agreement and UNION'S actions in obtaining it are violative

of both the Sherman Act and the anti-trust laws of Texas, and that it is not protected by the Construction industry proviso to §8(e) of the NLRA.

ARGUMENT

I.

THE SUBJECT AGREEMENT AND UNION'S ATTEMPTS TO OBTAIN SAME ARE VIOLATIVE OF THE SHERMAN ANTI-TRUST ACT

A. Introduction.

Prior to forcing CONNELL to agree to refuse to do business with any plumbing and mechanical firms unless they had a collective bargaining agreement with UNION, the local multi-employer group of mechanical contractors and UNION entered into a Master Area Collective Bargaining Agreement whereby UNION agreed to impose the same wage scale and working conditions on all other mechanical firms.[3] UNION then went completely outside of any collective bargaining framework and forced CONNELL to agree to refuse to do business with any mechanical or plumbing firms other than the favored employers who were parties to the Master Area Agree-

3 Article XIX of the Master Collective Bargaining Agreement (A. 118) provides as follows:

> "The Union further agrees that during the life of this Agreement that it will not grant or enter into any arrangement or understanding with any other employer *which provides for any wages less than stipulated in this Agreement* as the minimum wages *or for work under any more favorable terms or conditions* to the employer than are expressed or implied in this Agreement *for less than the rate of wages indicated in this Agreement.*" (emphasis added).

At the time of trial herein, UNION had negotiated another Master Agreement containing identical language in Article XVII (A. 119).

ment or those who would adopt it, if the UNION would allow them to do so. While under examination by counsel for CONNELL, the UNION'S Business Manager, Mr. Patterson, made it clear that the only plumbing contractors a general contractor such as CONNELL could do business with if he were a party to the subject agreement were those who executed the Master Area Agreement between UNION and the Mechanical Contractors Association:

> "Q. (By Mr. Canterbury) What is the Plaintiff's Exhibit 5(a), Sir?
>
> A. (By Mr. Patterson) This is an expired agreement between Local Union 100 and Mechanical Contractors Association of Dallas.
>
> Q. Is that the agreement that you had in force with mechanical contractors in the Dallas area at the time you sent the proposed contract which is the subject of this lawsuit to Connell Construction Company?
>
> A. This is the agreement.
>
> Q. Is that the agreement you are referring to when you say in your agreement that: 'Whoever the contractor may be shall not subcontract work to anybody who doesn't have an agreement with Local 100.' Is that the one you are referring to?

A. Yes, this is the one I refer to.

Q. Do you have — would there be any other agreement?

A. None other.

Q. Well, could a — suppose a subcontractor, mechanical contractor, wanted to get a contract. At the time could they come in and get different terms?

* * * * *

A. No. The agreement says that no one will be given a more favorable agreement. I couldn't if I desired, as an agent, sign an agreement other than the ones in existence between the local contractors and Local 100.

Q. I see. So that's — in other words, once you sign that contract with the Mechanical Contractors Association, that sets the only type of agreement which your Union can enter into with any other mechanical contractors, is that correct, sir?

A. That is true." (A. 73-74).

Since the commencement of this case, UNION has entered into a new collective bargaining agreement with a different multi-employer group, North Texas Contrac-

tors Association; however, UNION still would not grant a different collective bargaining agreement to any plumbing mechanical firm because of the "favored nations clause" contained in Paragraph XVII of the new Master Area Agreement (A. 74-77). This type of collective bargaining has been condemned by this Court in *United Mine Workers v. Pennington*, 381 U.S. 657 (1965), and in *Ramsey v. United Mine Workers*, 401 U.S. 302 (1971). In *Pennington*, this Court said:

> "(W)e think a union forfeits its exemption from the anti-trust laws when it is clearly shown that it has agreed with one set of employers to impose a certain wage scale on other bargaining units. One group of employers may not conspire to eliminate competitors from the industry and the union is liable with the employers if it becomes a party to the conspiracy. *This is true even though the union's part in the scheme is an undertaking to secure the same wages, hours, or other conditions of employment from the remaining employers in the industry.*" Id. 665-666 (emphasis added).

> "(T)here is nothing in the labor policy indicating that the union and the employers in one bargaining unit are free to bargain about the wages, hours and working conditions of other bargaining units or to attempt to settle these matters for the entire industry. On the contrary, the duty to bargain, unit by unit, leads to a quite different conclusion. The unions' obligation to its members would seem best served if the union retained the ability to respond to each bargaining situation as the individual circumstances

might warrant, without being strait-jacketed by some prior agreement with the favored employers." Id. at 666.

UNION had no labor dispute with CONNELL. It was admitted that the mechanical subcontrator on the project which UNION picketed to obtain the subject agreement was a Union contractor (A. 82). UNION's Business Manager testified that he was not even aware of the fact that CONNELL had done business with open shop mechanical firms in the past, but that he only wanted CONNELL to refuse to do business with any companies that do not have an agreement with UNION:

"Q. (By Mr. Canterbury) Mr. Patterson, in proposing this contract to Connell Construction Company, prior to the time you proposed it, were you aware of the fact that Connell did business with numerous open shop mechanical firms?

A. (Mr. Patterson) I wasn't aware of their total labor policy. I don't know how many open shop firms, mechanical, electrical, or otherwise, that they do business with.

Q. Did you know they did business with any open shop mechanical firms?

A. No, not to my knowledge at the time, I did not. At the time I proposed this, I had already, as I stated, proposed such an agreement to other mechanical — to other general contractors. No.

Q. When you started — when Local 100 started picketing on the Bruton Venture project, did not Connell have a union mechanical contractor on that job?

A. Yes, they had a union contractor, Dallas Air Conditioning.

Q. And the purpose of the picketing, it has been stipulated, was to get Mr. Connell to sign this agreement, correct?

A. This is correct.

Q. And you wanted Mr. Connell to not do business with any company that doesn't have a contract with Local 100?

A. That is what the proposed agreement states and what my cover letter also asks. (A. 82-83).

If this Court will compare the agreement (Pl. Ex. 2) and its effects with Section 1 of the Sherman Act, it will be found that the agreement reveals a violation on its face; that it is, in fact, a contract in restraint of trade, and that, by entering into such agreement, a union and an employer have conspired and combined to restrain trade in the construction industry. It was stipulated at the trial of this case that CONNELL was engaged in interstate commerce, or in a business affecting interstate commerce (A. 107). By entering into this agreement, CONNELL has become an extension of, or a vehicle for, UNION's extending its Master Area Agreement to lock up the construction market within its geographical jurisdiction,

which extends from Dallas, Texas, to the Oklahoma border (A. 72), for the benefit of the "favored employers" who have adopted UNION's Master Area Agreement.

The anti-competitive effects of the subject agreement are not only damaging to CONNELL, but to the mechanical and plumbing firms with whom CONNELL and the other general contractors who have entered into the agreement with UNION must boycott and refuse to do business. UNION has complete control over whom CONNELL, and all other general contractors from whom it has or can force a similar agreement, may do business. Since the Master Area Agreement is the "key" for a mechanical contractor to enter or remain in the construction market controlled by UNION and the favored employers, competition is lessened, construction costs are inflated, and a monoply is achieved by UNION and the favored employers through general contractors for the benefit of those mechanical contractors who hold or can obtain the "key" from UNION.

If a mechanical contractor's employees do not want to be represented by UNION; if they wish to belong to another union, or simply wish to exercise the right, presumably granted them by Section 7 of the NLRA, to refrain from belonging to any union, both they and their employer is cut out of the construction market. UNION is achieving results much broader than those condemned in *Pennington* and *Ramsey*, supra, with the enforced aid of CONNELL and others with whom it has no legal right to bargain, and is forcing all mechanical and plumbing firms out of the market unless they adopt the Master Agreement and require their employees to join UNION.

UNION'S scheme makes a mockery of the NLRA, but the NLRB is powerless to attack it because Complaints are dismissed by the General Counsel. UNION slides around the valid state anti-trust laws on a preemption theory that has been routinely applied and has, so far, escaped the Sherman Act proscriptions on a misplaced immunity theory. The question of whether or not UNION has violated the Sherman Act turns on the correct interpretation of the extent to which unions are exempt from federal anti-trust laws.

B. UNION'S Actions Herein Are Not Exempt From the Anti-Trust Laws.

1. History of Labor Exemption and Its Limitations

In 1908 this Court held that unions were subject to the Sherman Act. *Loewe v. Lawlor*, (commonly referred to as the *Danbury Hatters Case*), 208 U.S. 274 (1908). In 1914 Congress granted labor exemptions from the anti-trust laws in Sections 6 and 20 of the Clayton Act (15 USC §17 and 29 USC §52); however, those exemptions only apply to unions representing employees *vis-a-vis* their own employer — not to secondary actions that affect the market for goods and services. *Duplex Printing Press Co. v. Deering*, 254 U.S. 433 (1921); *Bedford Cut Stone v. Journeymen Stonecutters Ass'n*, 274 U.S. 37 (1927), and *United Mine Workers v. Coronado Coal Co.*, 268 U.S. 295 (1925). Congress responded to these cases by enacting the Norris-LaGuardia Act in 1932 (29 USC §101-§115); however, this Act granted no substantive exemptions, but only placed restrictions on the authority of federal courts to issue injunctions and restraining orders against labor unions.

In 1935 Congress enacted major labor law legislation in the Wagner Act, but did not condemn secondary boycotts.

The next major anti-trust-labor case was this Court's decision in *Apex Hosiery v. Leader*, 310 U.S. 469 (1940), wherein a primary labor dispute was held exempt from the anti-trust laws by balancing the dispute with the labor policy of the Clayton and Norris-LaGuardia Acts. The next year came *U.S. v. Hutcheson*, 312 U.S. 219 (1941), which involved a jurisdictional dispute that caused the losing union to institute a secondary boycott. The Court extended union's labor exemptions from injunctions granted by the Norris-LaGuardia Act to the status of substantive exemptions, and held the secondary boycott of *Hutcheson* immune from the anti-trust laws. In spite of the error of creating substantive exemptions out of the Norris-LaGuardia Act, the Court did balance federal labor policy, as it then existed, with federal anti-trust policy. Unions' abuses of their anti-trust immunity reached a climax in *Hunt v. Crumboch*, 325 U.S. 821 (1945), causing Justice Jackson to write a dissenting opinion in which he stated:

> "Those statutes which restricted the application of the Sherman Act against unions were intended only to shield the legitimate objectives of such organizations, not to give them a sword to use with unlimited immunity." Id. at 829.

After *Hutcheson*, union abuses of the anti-trust immunity caused Congress to outlaw the secondary boycott by Section 8(b)(4)A of the Taft-Hartley Act in 1947. In *National Woodwork Mfrs. Ass'n v. NLRB*, 386 U.S. 612 (1967), this Court concluded:

> "In effect Congress, in enacting 8(b)(4)A of the Act, returned to the regime of *Duplex Printing Co.* and *Bedford Cut Stone.*" Id. at 632.

The bare sketch of labor immunity above reveals that anti-trust activities of unions must be balanced with the policies of the NLRA which now establishes the limits of legitimate union activities. To complete the sketch, there are two separate and distinct theories of labor immunity which must be examined in detail, i.e., the conspiring or combining with non-labor interests and the legitimate union interest tests.

As shown below, the conduct of UNION herein is directly contrary to the purposes and intent of the NLRA, including the secondary boycott bans of that Act; therefore, UNION'S actions against and with CONNELL are not legal. The public policy, as stated in Section 2 of the Norris-LaGuardia Act (29 USC §102), is to promote collective bargaining and give employees full freedom of association by declaring that they shall be free from interference or restraint in the designation of their representatives. The agreement to which CONNELL has been made an unwilling party conflicts with this public policy. Also Section 20 of the Clayton Act (29 USC §52) speaks in terms of allowing labor organizations to *lawfully* carry out their *legitimate* objects. (emphasis added).

As also shown below, UNION has forfeited its immunities by conspiring and combining with CONNELL to achieve a restraint of trade outside of the limits of legitimate labor activities; therefore, nothing in the Norris-LaGuardia Act or the Clayton Act prohibits the issuance of the injunction CONNELL has sought in this case. However, even if the Court should decide that the Norris-LaGuardia Act prevents the issuance of an injunction herein, declaratory relief, holding the subject agreement violative of the Sherman Act, should be granted. It

was held in *Columbia River Packers v. Hinton*, 315 U.S. 143 (1942), that attempts of a union to interfere with the business relations of buyers and sellers of fish could not come within the definition of a labor dispute as defined in Section 13(c) of the Norris-LaGuardia Act (29 USC §113):

> "We recognize that by the terms of the statute there may be a 'labor dispute' where the disputants do not stand in the prosimate relation of employer and employee. But the statutory classification, however broad, of parties and circumstances to which a 'labor dispute' may relate does not expand the application of the Act to include controversies upon which the employer-employee relationship has no bearing." Id. at 146-147.

UNION has no labor dispute with CONNELL. It does not seek to represent a single employee of CONNELL, but only to regulate with whom CONNELL may do business, outside of any employer-employee relationship.

2. UNION Forfeited Its Anti-Trust Immunity by Conspiring and/or Combining With CONNELL to Restrain Trade.

This Court has previously held that a union forfeits any anti-trust immunities granted by Sections 6 and 20 of the Clayton Act (15 USC §17 and 29 USC §52) and Sections 1 and 4 of the Norris-LaGuardia Act (29 USC §§101 and 104) if that union conspires with an employer to lessen or restrict competition. In *Allen Bradley Co. v. Local 3, IBEW*, 325 U.S. 797 (1945), this Court held violative of the

Sherman Act a combination among a union and electrical contractors and manufacturers to lessen and restrict competition in electrical products in New York City. The simple product boycott in *Allen Bradley* pales in comparison to the boycott accomplished by the agreement herein. The agreement between CONNELL and UNION results in an effective boycott of all business enterprises which cannot, or do not for any reason, adopt UNION'S established Master Agreement. Also, the boycott is not limited to any particular construction project — it extends to all future work. Since the single subcontract in the construction industry has historically covered both products and labor, they are foreclosed from the marketplace. The boycott here, because of the way contracts are let in the construction industry, essentially extends to all the products that would be covered under any contract for mechanical work CONNELL may sign with any other employer.

Since *Allen Bradley*, this Court has repeatedly held that unions lose their anti-trust immunity if they conspire or combine with business interest to restrict competition or otherwise violate the anti-trust laws. *U.S. v. Employing Plasterers Ass'n*, 347 U.S. 186 (1954); *L.A. Meat and Provision Drivers Union v. U.S.*, 371 U.S. 94 (1962); *United Mine Workers v. Pennington*, supra. However, these cases involve unions conspiring with business interests to create a monopoly or business advantage for the non-labor parties to that particular form of conspiracy. CONNELL, admittedly, receives no benefit from the combination with UNION; however, CONNELL, together with those other general contractor parties to the subject agreement, are the vehicles by which UNION transmits its restraints of trade on all non-union mechanical and

plumbing firms within the Dallas and North Texas Construction markets. The benefactors are the "favored employers" that are parties to UNION'S Master Area Agreement.

CONNELL is both a conspirator with and victim of UNION. The form is different, but the substance is the same. A conspiracy between CONNELL and UNION exists. If there is no conspiracy, there is, at the minimum, a "combination" between them which is also violative of the Sherman Act, 15 USC §1.

The Court of Appeals failed to find a conspiracy on the grounds that CONNELL is the sole non-labor party to the agreement and is itself alleging serious injury from the agreement (Pet. App. B-23). The best answer to the Court of Appeals majority on this issue is the statement of this Court in *Local Union No. 189, Amalgamated Meat Cutters v. Jewel Tea Co.*, 381 U.S. 676 (1965):

> "The fact that the parties to the agreement are but a single employer and the unions representing its employees does not compel immunity for the agreement. We must consider the subject matter of the agreement in the light of the national labor policy." Id. at 689.

The agreement herein goes even further, for it is outside of the employer-employee relationship. Although there has been much written on the legal meaning of the words "conspiracy" and "combination", the subject agreement reveals a violation of the Sherman Act on its face, regardless of the semantics employed. The agreement (contract) was entered into by CONNELL and UNION (conspiracy) or (combination) and it is in restraint of trade in interstate commerce, Sherman Act, 15 USC §1, outside of any collective bargaining relationship.

However, even if no conspiracy or combination should be found by this Court, the subject agreement must be examined in the light of, and balanced with, national labor policy to determine whether or not it falls within the bounds of legitimate labor interests.

3. UNION'S Conduct and the Subject Agreement Are Not Legitimate Labor Interests.

In *Jewel Tea*, supra, this Court established the "legitimate union interest" test to determine whether a union's conduct is immune from the Sherman Act. As Justice White suggests in his *Jewel Tea* opinion, the subject matter of the agreement must be considered in light of the national labor policy. The issue in *Jewel Tea* involved a restriction on market hours contained in a collective bargaining agreement. The restrictive clause was held exempt from the Sherman Act, but not because of the lack of a conspiracy or combination. Justice White, in his *Jewel Tea* opinion, balanced the anti-competitive effects of the market hours restrictions with federal labor policy and held that the clause was exempt because it was the result of collective bargaining and had a direct and intimate relation to the working conditions of employees *vis-a-vis* their own employer. Justice Goldberg, in a concurring opinion, would extend anti-trust immunity to all mandatory subjects of collective bargaining. Justice Douglas dissented, finding that, since competing employers could not agree on their own to restrict competitive practices, the addition of a labor union could not shield the agreement from the anti-trust laws.

The agreement herein would conflict with all of the opinions in *Jewel Tea*. Since CONNELL and UNION have no duty or right to bargain about employment conditions of mechanical contractors, there are no mandatory subjects of bargaining between them, muchless any basis for an agreement by CONNELL to boycott; therefore, no immunity would attach under the opinions of Justice Goldberg or Justice White.

Even if there were a bona fide collective bargaining relationship between CONNELL and UNION, the agreement would not be immune in Justice Douglas' opinion because it is an extension of the Master Area Agreement which is violative of *Pennington* and *Ramsey* on its face. As Justice Clark, of the Fifth Circuit, in his dissenting opinion, stated:

> "Thus, no matter whose blend of *Jewel Tea* is thought to be more palatable, the court there confirms that some behavior declared legitimate by the earlier Clayton and Norris-LaGuardia Acts, but proscribed by the National Labor Relations Act as subsequently amended falls without the anti-trust exemption." (Pet.App. B-53).

Therefore, even assuming the lack of a combination or conspiracy between CONNELL and UNION, the subject agreement must be accommodated and balanced with national labor policy. Besides UNION'S sole defense of the construction industry proviso to Section 8(e) of the NLRA, which is treated separately below, the subject agreement conflicts with the NLRA in many respects.

The purpose of the NLRA is to avoid industrial strife which interferes with interstate commerce and "to

prescribe the legitimate rights of both employees and employers", 29 USC §141. The findings and declaration of policy of Congress, as set forth in 29 USC §151, are to encourage the practice of collective bargaining and to protect the right of workers to choose their own representatives for collective bargaining. CONNELL has bargained with the representatives of its various classes of employees; however, the subject agreement requires CONNELL to dictate the exact terms of employment for the employees of all mechanical firms with which it does business. Section 7 of the NLRA, 29 USC §157, is the employees' Bill of Rights to self-organization, to form, join or assist labor organizations, to bargain collectively, through representatives of their own choosing, or to refrain from any or all of such activities. The subject agreement makes a mockery of these rights for employees of mechanical and plumbing firms in the Dallas and North Texas area, as well as other areas of the country where unions employ similar tactics. Section 9 of the Act, 29 USC §159, provides for the selection of labor unions by the secret ballot of employees. Section 8(b)(4)(B), 29 USC §158(b)(4)B,[4] banning secondary boycotts, ostensibly protects CONNELL and other employers from union pressures to force them to cease doing business with any other person. In *NLRB v. Denver Building Trades Council*, 341 U.S. 675, (1951), this Court recognized the objective of Congress in enacting Section 8(b)(4)(B), formerly Section 8(b)(4)(A), of the NLRA, as amended, stating as follows:

> "In the views of the Board as applied in this case we find conformity with the dual Congressional

4 Section 8(b)(4)(A) of the Taft-Hartley Act, now Section 8(b)(4)(B) of the National Labor Relations Act, as amended by the Labor Management Reporting and Disclosure Act of 1959, 29 USC §158 (b)(4)(B).

> objectives of preserving the right of labor organizations to bring pressure to bear on offending employers in primary labor disputes and of shielding unoffending employers and others from pressures in controversies not their own." Id at 692.

This case generated annual attempts of construction unions to obtain a "common situs" picketing bill from Congress in order to overrule this Court's *Denver Building Trades* decision. Congress has consistently rejected all such attempts.[5] However, if the type of agreement herein is allowed to continue, unions can escape the decisions of this Court and the intent of Congress simply by picketing a general contractor with whom they have no dispute for a similar agreement and their actions magically become primary. The result will be a stranglehold on the entire construction industry.[6]

As far as the employees are concerned, UNION'S position is that it has the right to say to them, "The Act may say you have the right to have an election, the right to vote by secret ballot, the right to refrain from union activities, etc., but these statutory rights are really

5 Examples are H.R. 9070, H.R. 9089, H.R. 9373 and S. 2643 (86th Congress, 1960); H.R. 10027 (89th Congress, 1965); H.R. 100 (90th and 91st Congress, 1967, 1969); and H.R. 4726 (93rd Congress, 1973).

6 The questioned agreement is prevalent beyond the one between CONNELL and UNION herein. At the trial of this case, UNION produced evidence that the Los Angeles, California Building and Construction Trades Council has 9,722 similar agreements. The District Court below found in Finding of Fact No. 13, that UNION had obtained similar agreements from other general contractors in the Dallas area. Attempts of trade unions in Philadelphia to obtain a similar agreement from Altemose Construction Company resulted in approximately $300,000.00 property damage which actions are subject of a pending lawsuit, *Altemose v. Building and Construction Trades*, No. 73-773, in the United States District Court for the Eastern District of Pennsylvania. Construction trade unions have also picketed to obtain similar agreements in Florida and Ohio. See also fn. 2, supra.

meaningless because we can cut off these rights by simply bypassing you, by going for your employer's 'jugular vein' — either he signs a contract giving us full control over you and the terms and conditions of your employment, or he cannot sell and install his products and you will not get the work because we have the help of the general contractor."

The subject agreement must also be examined in connection with Sections 8(a)(5) and 8(b)(3), 29 USC §158(a)5 and (b)3, which makes it an unfair labor practice for an employer or union to refuse to bargain collectively in good faith. Even if UNION were the duly elected representative of every mechanical subcontractor with whom CONNELL desires to do business, UNION can have only one bargaining position — "sign the Master Agreement or get out of the market." Is this approach "good faith" bargaining?

Also the bans of picketing contained in Section 8(b)(7) of the Act can be escaped with ease if the proviso to §8(e) is interpreted to permit stranger unions to picket for the subject agreement. UNION can likewise make an "end run" around the clear intent of Congress that picketing shall not be allowed to obtain a pre-hire agreement, allowed, if voluntary, in the construction industry by Section 8(f) of the Act, by picketing general contractors to boycott those companies not parties to the Master Area Agreement. (I Leg. Hist. of the Labor Management Reporting and Disclosure Act of 1959, 946, and Vol. II at 1715.)

In summary, the subject agreement conflicts with the entire purpose and numerous provisions of the NLRA to

the point that it fails to meet any reasonable application of a "legitimate labor interest" test, regardless of its ultimate goal.

Whether hinged on the "conspiracy" theory, the "combination" theory, the practical effects of the agreement (contract) itself, or the "legitimate union interest theory", or all of these theories, UNION'S actions herein are not immune or exempt from the clear language of the Sherman Act unless the proviso to Section 8(e) gives the exemption or federal courts are prohibited from examining and deciding labor questions asserted by unions in defense to anti-trust allegations.

C. Federal Courts Should Adjudicate Labor Law Issues Arising in Anti-Trust Cases.

As shown in UNION'S Answer and Counterclaim (A. 21-25), its sole defense to CONNELL'S anti-trust allegations is that the construction industry proviso to Section 8(e) of the NLRA protects the subject agreement and coercive actions to obtain it. The Federal District Court ignored the anti-trust questions of this case and decided the 8(e) question in error. The Fifth Circuit majority declined to decide the 8(e) or other labor law questions of the case and considered the anti-trust issues in error, partially because of the failure to consider the labor law questions. The panel majority made a strong plea for the NLRB to decide the 8(e) question at the "next available opportunity", but that plea has been rejected by the NLRB General Counsel; therefore, the NLRB cannot

decide the 8(e) questions which are germane to this case.[7] Of course the NLRB could not decide the anti-trust issues even it it had the opportunity to do so. Only Judge Clark, in his dissenting opinion, considered the *entire* case and reached sound results (Pet. App. B-49 - B-65).

Federal courts should decide labor law questions of anti-trust cases and not relegate a party to an administrative remedy when those questions are germane, but secondary, to the anti-trust questions. CONNELL filed no charges with the NLRB herein because this case involves anti-trust violations and for the further reason that it would have been no more effective than filing them in the wastebasket. CONNELL sought instead a declaratory judgment as to the legality of the subject agreement under the anti-trust laws pursuant to 29 USC §2201. Since UNION not only relied on Section 8(e) of the NLRA as a defense, but also sought affirmative declaratory relief based on that provision of the NLRA, both anti-trust and labor issues were properly before the federal court for decision and became inextricably intertwined. Rule 57 F.R.C.P. provides: "The existence of another adequate remedy does not preclude a judgment for declaratory relief in cases where it is appropriate". CONNELL did not even have another "adequate remedy" in view of the NLRB General Counsel's position. The allegation that various types of union activity arising in anti-trust cases are subject only to NLRB determination has been considered and rejected by this Court before in *Local 189 Amalgamated Meat Cutters v. Jewel*

7 See fn. 2 supra. The refusal of the General Counsel to issue a Complaint prevents the NLRB from deciding the labor issues and that refusal is unreviewable. *Vaca v. Sipes*, 386 U.S. 171 (1967).

Tea, supra. One of the questions considered in that case was:

> "Whether a claimed violation of the Sherman Anti-Trust Act which falls within the regulatory scope of the National Labor Relations Act is within the exclusive primary jurisdiction of the National Labor Relations Board." Id at 684.

The answer to this question was "No". This Court, in considering the question, reasoned that courts are not without experience in federal labor questions. On the question of primary jurisdiction, it was stated:

> "Secondly, the doctrine of primary jurisdiction is not a doctrine of futility; it does not require resort to an expensive and merely delaying administrative proceeding when the case must eventually be decided on a controlling legal issue wholly unrelated to determinations for the ascertainment of which the proceeding was sent to the agency." *Maritime Board v. Isbrandtsen Co.* 356 U.S. 521 (Frankfurter, Jr. dissenting).

> "Finally, we must reject the union's primary jurisdiction contention because of the absence of an available procedure for obtaining a Board determination." Id at 686.

On the same day this Court decided *Jewel Tea*, it decided *United Mine Workers v. Pennington*, supra, another anti-trust case arising in a labor law context. In the facts of this case, and other anti-trust cases involving labor questions, this Court should hold, in definite terms, that

federal courts have the power to decide, and this Court should decide, the *entire* case, including the labor law questions.[8]

II.

SECTION 8(e) OF THE NLRA DOES NOT IMMUNIZE THE SUBJECT AGREEMENT NOR UNION'S COERCIVE ACTIONS TO OBTAIN IT

In 1959 Congress enacted Section 8(e) of the NLRA, which prohibits "hot cargo" agreements or agreements between any "labor organization" and "any employer" whereby such employer agrees to cease doing business with any other "person". A proviso for the construction industry was included and it reads as follows:

> *"Provided*, that nothing in this subsection shall apply to an agreement between a labor organization and an employer in the construction industry relating to the contracting or subcontracting of work to be done at the site of the construction, alteration, painting, or repair of a building structure, or other work;" (29 U.S.C.A. §158(e)).

8 Two other Circuits have recently been frustrated by the problems of primary jurisdiction concerning labor issues arising in anti-trust cases. The Third Circuit in *Int'l Ass'n of Heat and Frost Insulators v. United Contractors Ass'n, Inc.*, 483 F.2d. 384 (3rd Cir. 1973), directed the District Court to certify labor questions involved in an anti-trust case to the NLRB for answer. The NLRB, through its General Counsel, is resisting the answering of those questions. In *Carpenters' District Council v. United Contractors Ass'n of Ohio*, 484 F.2d. 119 (6th Cir. 1973), pet. for reh. pending, the Sixth Circuit also attempted to remand an anti-trust case to the District Court with directions to certify labor issues to the NLRB. The General Counsel of NLRB is also resisting the NLRB's answering those questions; therefore, at least three Circuits are currently frustrated over the question of primary jurisdiction when labor issues are involved in anti-trust cases.

The language of the above quoted proviso refers to an agreement between a labor organization and an employer. Since CONNELL has no employees who are represented by UNION, never has had any, and does not perform plumbing and mechanical work with its own employees, CONNELL is not an employer *vis-a-vis* UNION, for the purposes of the above quoted proviso. The definition of an employer contained in Section 2(2) of the NLRA [29 USC §152(2)], defines the term "employer" to include any person acting as an agent of an employer directly or indirectly. There is no evidence that CONNELL acts as the agent of its plumbing and mechanical subcontractors; on the contrary, the evidence shows that CONNELL does not have anything to do with the labor relations policies of its subcontractors and their employees. (A. 52, 68).

Section 2(5) [29 USC §152(5)] of the NLRA defines a labor organization as "an organization which exists for the purpose" in whole or in part of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment or conditions of work. Since CONNELL has no employees whose interests UNION could represent — and, in fact, specifically declines any interest in representing — UNION is no labor organization *vis-a-vis* CONNELL, as the proviso to 8(e) requires.

Judicial interpretation of the construction industry proviso has been twisted to the point that it is currently legal to picket to obtain subcontract agreements, but illegal to picket or use other forms of coercion to enforce them. The first time the NLRB considered the proviso, it was the unanimous opinion of the Board that picketing and other forms of coercion were not permissible for the

purposes of obtaining a "hot cargo" clause. *Colson & Stevens Construction Co.*, 137 NLRB 1650 (1962). This well reasoned decision of the NLRB was abandoned after three circuits held that picketing to obtain a subcontractor agreement was permissible,[9] and in the case of *Centlivre Village Apartments*, 148 NLRB 854 (1964), the Board held that picketing to obtain a "hot cargo" clause was permissible. The NLRB however did not pass on the validity of the particular clause in *Centlivre*, 148 NLRB at 856, fn. 11. This Court has not ruled on the reach and permissible limits of the construction industry proviso and there is no meaningful decision of the NLRB, or any court, on the application of the proviso absent a bargaining relationship.

A literal reading of the proviso could and has mislead some courts to allow coercion by a union to obtain a "hot cargo" clause in the construction industry. A literal reading has also lead some persons to believe that the proviso extends beyond the employer *vis-a-vis* his own employees; however, a literal interpretation conflicts with the very purposes of the NLRA, as well as the secondary boycott provisions of the Act. Therefore, it is necessary to examine the legislative history of Section 8(e) and the narrow construction industry proviso which reveals two clear intentions of Congress:

1. The proviso only applies to voluntary agreements;

9 *Construction Laborers Union v. NLRB*, 323 F.2d. 422 (9th Cir. 1963); *Essex County Carpenters v. NLRB*, 332 F.2d. 636 (3rd Cir. 1964); and *Orange Belt Dist Council of Painters v. NLRB*, 328 F.2d. 234 (D.C. Cir. 1964). However these cases, as well as all others involving an interpretation of the proviso, involved a collective bargaining relationship which is absent here.

2. The proviso was only intended to be applicable in a collective bargaining relationship, i.e., a union representing employees *vis-a-vis* their employer.

In examining the secondary boycott provisions of the NLRA prior to the 1959 amendments, this Court issued two landmark decisions: *NLRB v. Denver Bldg. & Const. Trades Council,* supra, and *United Brotherhood of Carpenters v. NLRB,* 357 U.S. 93 (1958), commonly referred to as the *Sand Door* case. In *Denver Bldg. Trades,* it was held that the objectives of Congress in outlawing secondary boycotts in §8(b)(4)(A), now §8(b)(4)(B), of the NLRA, applied to a common situs and were to preserve the rights of unions to bring pressure on an offending employer in primary labor disputes and of "shielding unoffending employers and others from pressures in controversies not their own." 341 U.S., at 692.

In *Sand Door,* it was held that a hot cargo clause was no defense to a union's actions in violation of the secondary boycott bans of the NLRA, but that an employer may *voluntarily* agree to a boycott. In a dissenting opinion, Justice Douglas would have permitted enforcement of the hot cargo provision because it was the product of collective bargaining, not of coercion. 357 U.S. 112. UNION obtained CONNELL'S agreement to boycott by coercion, there being no collective bargaining relationship.

During debates on §8(e), the construction industry proviso was added to allow unions the exemptions to make *voluntary* hot cargo agreements, as allowed under *Sand Door,* in a collective bargaining relationship.

The late President John F. Kennedy, then Senator Kennedy, in discussing the proviso, stated:

> "Since the [8(e)] proviso does not relate to Section 8(b)(4), strikes and picketing to enforce the contracts excepted by the proviso will continue to be illegal under Section 8(b)(4) whenever the *Sand Door* case is applicable. It is not intended to change the law with respect to the judicial enforcement of these contracts, or with respect to the *legality of a strike to obtain such a contract.*" II Leg. Hist. of the Labor Management Reporting & Disclosure Act of 1959, 1433 (emphasis added).

By enacting Section 8(e)., Congress in no manner altered the rule of the *Sand Door* case. The House Conference Report contains the following:

> "The Committee of Conference does not intend that this proviso should be construed so as to change the present state of the law with respect to the validity of this specific type of agreement relating to work to be done at the site of the construction project or to remove the limitations which the present law imposes with respect to such agreements. Picketing to enforce such contracts would be illegal under the *Sand Door* case . . . . . *The proviso is not intended to limit, change, or modify the present state of the law with respect to picketing at the site of a construction project.* Restrictions and limitations imposed upon such picketing under present law, as interpreted, for example, in the U.S. Supreme Court decision, *Denver Building Trades* case,

would remain in full force and effect. *It is not intended that the proviso change the existing law with respect to judicial enforcement of these contracts or with respect to the legality of a strike to obtain such a contract.*" 1 Leg. Hist. of the Labor Management Reporting and Disclosure Act of 1959 at 943-944 (emphasis added)

Since Congress did not intend that the proviso change the law regarding the legality of a strike or picketing to obtain a subcontractor agreement, the law prior to 1959 must be examined. The examination reveals that it was not legal to strike, picket or use coercion to obtain a hot cargo agreement. *Texas Industries, Inc., et al,* 112 NLRB 923, enf. 234 F.2d. 296 (5th Cir. 1956); *Bangor Bldg. Trades Council,* 123 NLRB 484, enf. 278 F.2d. 287 (1st Cir. 1960); *Selby-Battersby & Co.,* 125 NLRB 1179. Also, the intention of this Court prior to the 1959 amendments, as revealed in *Sand Door,* was to allow only voluntary agreements, for the Court stated:

> "A more important consideration, and one peculiarly within the cognizance of the Board because of its closeness to and familiarity with the *practicalities of the collective bargaining process,* is the possibility that the contractual provision itself may well not have been the result of choice on the employer's part free from the kind of coercion Congress had condemned. It may have been *forced* upon him by strikes that, if used to bring about a boycott when the union is engaged in a dispute with some primary employer, would clearly be prohibited by the Act. Thus, to allow the union to invoke the provision

> to justify conduct that, in the absence of such a provision, would be a violation of the statute might give it the means to transmit to the moment of boycott, through the contract, the very pressures from which Congress has determined to relieve secondary employers." 357 U.S. 106 (emphasis added).

The intention of Congress to allow only *voluntary* "hot cargo" agreements by the proviso is further revealed by the legislative history on §8(f) of the Act which allows unions and employers in the construction industry to make voluntary pre-hire agreements. In enacting §8(f), Congress gave permission for voluntary pre-hire agreements only; coercion was not to be allowed. The Senate Committee analysis reads:

> "Nothing in [8(f)] is intended ..... to authorize the use of force, coercion, strikes or picketing to compel any person to enter into such pre-hire agreements." I Leg. Hist. Labor Management Reporting and Disclosure Act of 1959, 946. (See also Colloquy between Senators Holland and Kennedy, read into the record by Congressman Barden at Vol II, 1715)

Congress obviously intended that the limiting of pre-hire agreements to voluntary ones mesh with the limiting of "hot cargo" clauses to voluntary ones, in the construction industry. This fact is further reinforced by another proviso to §8(e) enacted for the garment industry. The garment industry proviso is much broader; it exempts "hot cargo" agreements from both the bans of 8(e) and the secondary boycott bans of 8(b)(4)(B), thereby allowing coercion in obtaining the agreements in that industry.

However, the construction industry proviso simply makes §8(e) inapplicable to "an agreement" in the construction industry.

The only time this Court had the opportunity to consider the proviso was in *National Woodwork Mfrs. Ass'n v. NLRB*, supra, wherein the question was whether or not a work preservation clause violated the secondary boycott bans of the Act. In finding the particular primary clause which was the result of collective bargaining outside the scope of §8(e), exempt, this Court stated:

> "The touchstone is whether the agreement or its maintenance is addressed to the *labor relations of the contracting employer vis-a-vis his own employees.*" 386 U.S. 645 (emphasis added).

The distinction is easy to draw in CONNELL'S case. UNION'S subcontractor agreement is addressed to the labor relations of employers other than CONNELL.

In *National Woodwork Mfrs.*, supra, the general contractor, Frouge Corporation, as opposed to CONNELL in the case before this Court, was *a party to the collective bargaining agreement* containing a work perservation clause and Frouge Corporation *hired employees covered by the collective bargaining agreement.* CONNELL is neutral concerning the labor relations of its independent plumbing and mechanical subcontractors, and UNION herein has picketed CONNELL simply to satisfy its objectives elsewhere of eliminating all companies with which it does not have a collective bargaining agreement.

The *National Woodwork* and *Sand Door* opinions fully support the Congressional intent that the construction industry proviso apply only to agreements made in a collective bargaining relationship. For example, Senator McNamara, in commenting on the construction industry proviso, stated:

> "The proviso permits plumbers and pipefitters local unions to bargain with *their* contractors relative to the contracting or subcontracting out of any fabrication of the pipe . . . ." (emphasis added) II Leg. Hist. of the Labor Management Reporting and Disclosure Act of 1959, 1815.

By the words, "their contractors," Senator McNamara obviously meant plumbing and mechanical contractors who bargain with the unions representing their employees, not a contractor who has no such bargaining relationship.

In commenting on the construction and apparel industries provisions to Section 8(e), Congressman Frelinghuysen of New Jersey made the following statement:

> " 'Hot cargo'. The Landrum-Griffin Bill extended the hot cargo provisions of the Senate bill to all agreements between an employer and a labor union by which the employer agrees not to do business with another concern. The Senate insisted upon a qualification for the clothing and apparel industries and for agreements relating to work to be done at the site of a construction project. Both changes were necessary to avoid serious damage to the *pattern of collective bargaining* in these industries." (emphasis add-

ed) II Leg. Hist. of the Labor Management Reporting and Disclosure Act of 1959, 1815.

Senator Kennedy, the conference chairman, used identical language in his analysis of the conference report: "to avoid damage to the pattern of collective bargaining in [this] industry", II Leg. Hist., 1432.

The Court of Appeals requested supplemental briefs in this case as to the pattern of collective bargaining prior to the 1959 amendments. UNION was unable to show that agreements to the type herein, i.e., outside of the collective bargaining relationship, ever existed in the construction industry prior to 1959; therefore, Congress was not preserving "hot cargo" clauses outside of any bargaining relationship.

In amending Section 8(b)(4) and adding Section 8(e), Congress sought to prevent the involvement of neutral employers such as CONNELL in labor disputes not their own. The legislative history reveals that the construction industry proviso was added to allow voluntary agreements to restrict subcontracting within the employer-employee relationship. Congress only intended for construction unions to retain the same rights they enjoyed prior to the amendments.

The subject agreement, not being immunized by the proviso, falls under the ban of Section 8(e); however, even if the agreement does not fall within the ban of 8(e), the method of obtaining it runs contrary to the secondary boycott and coercive bans of 8(b)(4)A&B because UNION has picketed and coerced CONNELL to force it to refrain from doing business with other persons.

Therefore, after all balancing of the Sherman Act and the NLRA is completed, the only logical conclusion is that UNION has no anti-trust immunity herein.[10]

III.

NEITHER THE SUBJECT AGREEMENT NOR UNION'S CONDUCT IN OBTAINING IT ARE PREEMPTED FROM REGULATION UNDER STATE ANTI-TRUST LAWS

By its decision, the majority of the Court of Appeals below has given labor unions an *absolute and unlimited exemption* from all state anti-trust laws. This result was reached because the Court of Appeals ruled, in effect, that any activity which can be called or related to, even by the most strained reasoning, a labor matter is protected from state anti-trust action by the Preemption Doctrine established in *San Diego Building Trades Council v. Garmon*, 359 U.S. 236 (1959).

The dangers and injustices inherent in the unlimited application of the Preemption Doctrine were recognized

10 After a diligent attempt to suggest a proper balancing conclusion to this Court, counsel for CONNELL cannot improve on the conclusion of Judge Clark in his dissent:

> "Therefore, I would hold that where a union bypasses the congressionally sanctioned methods of organizing the employer whose employees it seeks to unite (here the individual subcontractors) and illegally brings pressure on a neutral, secondary source of work for all such employers within an area (Connell) to force that unrelated economic entity to execute a contract which requires that all directly involved subcontractors bring their work forces into the membership of this local or starve for lack of work, then that union has passed beyond the scope of anti-trust immunity." (Pet. App. B-57), 483 F.2d. at 1179.

by four of the Justices of this Court in their dissenting opinion in *Amalgamted Association of Street Electric Railway and Motor Coach Employees v. Lockridge*, 403 U.S. 274 (1971). The greatest single danger is the fact that any party who believes himself injured by union action can be (and often is) denied any legal relief because of an unreviewable decision of the General Counsel of the NLRB to refuse to issue a Complaint. As stated by Justice Douglas:

> "From this it follows that if the General Counsel refuses to act, no one may act and the employee is barred from relief in either state or federal court. (Citations omitted). When we tell a sole individual that his case is 'arguably' within the jurisdiction of the Board, we in practical effect deny him any remedy." Id at 305.

The fact that application of the Preemption Doctrine in the case now before this Court could and would act to deny CONNELL any legal recourse to protect its rights, as feared by the dissenting Justices in the Lockridge case, is no longer a mere possibility, but established fact. The General Counsel's refusal to issue Complaints involving the identical agreement[11] makes it clear that no charges filed with the NLRB in a similar situation would ever be the subject of a Complaint which would be heard by the Board. Thus, the NLRB is prevented from even considering the legality of UNION'S actions and form of agreement in question here and, by the application of the Preemption Doctrine, not only to state laws, but to the jurisdiction of the federal courts, would deny any legal relief beyond the unreviewable decision of the General Counsel. It is inconceivable that this Court should, for the

11 See fn. 2, supra.

sake of the ephemeral concept of "uniformity", take away all rights to legal relief except as those rights are granted by the General Counsel. As Justice White, joined by the Chief Justice, stated in his dissent in the *Lockridge* case:

> "(C)onsiderations that justify exceptions to the rule of uniformity apply with greater force to §7 situations . . . basic concepts of fundamental fairness, regardless of their effect on the model of uniformity, counsel against any rule that so inflexibly bars a hearing."

Two other facts highlight the improper application of the Preemption Doctrine in this case. First is the simple fact that Congress never intended the enactment of labor statutes to give labor unions automatic and absolute exemption from either state or federal anti-trust laws, nor did Congress intend to remove "labor issues" from the realm of anti-trust law. The statutes enacted by Congress in this particular area, Sections 6 and 20 of the Clayton Act and Sections 1 and 4 of the Norris-LaGuardia Act, speak in terms of legal activities by unions. Further, this Court, in *Giboney v. Empire Storage and Ice Co.*, 336 U.S. 490 (1949), specifically rejected the theory that labor unions and labor related activities enjoy an inherent exemption from state or federal anti-trust regulations.

The second important factor is that Congress never gave the NLRB power or authority to consider or apply any state or federal anti-trust law. Since the Board has no power to consider, interpret, apply or grant any relief under state or federal anti-trust laws, application of the Preemption Doctrine as urged by UNION, that is, on a blanket and absolute basis, would have the effect of

granting the absolute anti-trust immunity to unions which Congress and this Court have deemed inadvisable.

Despite the refusal of the majority of the Court of Appeals to even consider any of the labor law issues inherent in this case, that majority, nevertheless, held that anti-trust laws of Texas were preempted, not by federal anti-trust laws, but *only by federal labor laws.* Such a result is in direct conflict with this Court's decisions in *Local 24, Int'l Brotherhood of Teamsters v. Oliver,* 358 U.S. 283 (1957) and *Giboney v. Empire Storage & Ice Co.,* supra, where this Court held that federal labor laws act to preempt state law only when the federal laws apply to a case and are in real conflict with the state law in question. CONNELL submits that the labor law issues must be decided before there can be even consideration, muchless application, of the Doctrine of Preemption.

Throughout this case, CONNELL has asserted that the absence of any employer-employee relationship and any collective bargaining relationship is a central issue in the determination of questions of anti-trust immunity. The significance of this issue was established by this Court very clearly in *Hanna Mining Co. v. Marine Engineers Beneficial Ass'n, Dis't 2,* 382 U.S. 181 (1965) That case involved the question of whether federal labor law applied to attempts by picketing to force recognition of a union to bargain only for supervisors and whether or not state law was thereby preempted. This Court held that, since supervisors were not employees under the federal labor laws and no other persons defined as employees were involved, the matter was outside the regime of the NLRA, and the Preemption Doctrine would not apply.

Neither of the courts below really considered the question of whether the subject agreement and activities related thereto violate or could violate the Texas anti-trust laws. Nevertheless, it is clear that the agreement is, on its face, illegal under Texas anti-trust laws as are UNION'S actions in forcing CONNELL to enter into the agreement. If the semantic exercises relied on by UNION are discarded, the true nature of UNION'S actions and the agreement are obvious. UNION, either unable or unwilling to achieve its goals by the lawful organizing methods sanctioned and established by Congress, has resorted to the illegal means of forcing out of business all construction industry employers who fail to force UNION representation on their employees. UNION is achieving its goal by conspiring or combining with other employers and implementing it by CONNELL and other general contractors, so that the general contractors give no business to any subcontractor not accepting UNION'S dictated terms.

Thus, the actions and agreement under review by this Court constitute clear and classic violations of the Texas anti-trust laws contained in Section 15.02, 15.03 and 15.04 of the Texas Business and Commerce Code, (Reproduced in the Appendix to this Brief). Violations by a union of the Texas anti-trust laws in a very similar fact situation were found in *Best Motor Lines v. Int'l Brotherhood of Teamsters, Chauffers, Warehousemen & Helpers, Local 745,* 237 S.W.2d. 589 (Tex.S.Ct. 1951). As stated by the Texas Supreme Court in *Best:*

> "The Texas Anti-Trust statutes are valid laws and all persons are subject thereto, and the courts have the power to enjoin acts and conduct in

> violation thereof. Labor unions are not excepted, even though there exists a labor dispute and the picketing is peaceful." Id at 597.
>
> "Thus, it will be seen that the very statutes which give the unions life, expressly provide that their activities must conform to the requirements of our Anti-Trust statutes." Id. at 598.

Thus, it can be seen that violations of state law are really unquestioned.

CONCLUSION

For the foregoing reasons it is respectfully requested that this Supreme Court reverse the judgment of the lower courts and hold that the subject agreement and UNION'S coercive method of obtaining it are violations of the Sherman Act and the anti-trust laws of Texas. CONNELL further requests declaratory relief that the construction industry proviso to Section 8(e) of the NLRA does not protect the subject agreement, and that the Court declare the agreement null and void together with appropriate injunctive relief restraining UNION from seeking or enforcing such agreement by any means.

Respectfully submitted,

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APPENDIX

APPENDIX

SHERMAN ACT

§1, 15 U.S.C. §1:

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal: * * * Every person who shall make any contract or engage in any combination or conspiracy [hereby] declared * * * to be illegal shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding fifty thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.

CLAYTON ACT

§6, 15 U.S.C. §17: Antitrust laws not applicable to labor organizations

The labor of a human being is not a commodity or article of commerce. Nothing contained in the antitrust laws shall be construed to forbid the existence and operation of labor, agricultural, or horticultural organizations, instituted for the purposes of mutual help, and not having capital stock or conducted for profit, or to forbid or restrain individual members of such organizations from lawfully carrying out the legitimate objects thereof; nor shall such organizations, or the members thereof, be held or construed to be illegal combinations or conspiracies in restraint of trade, under the antitrust laws.

§20, 29 U.S.C. §52: Statutory restriction of injunctive relief

No restraining order or injunction shall be granted by any court of the United States, or a judge or the judges thereof, in any case between an employer and employees, or between employers and employees, or between employees, or between persons employed and persons seeking employment, involving, or growing out of, a dispute concerning terms or conditions of employment, unless necessary to prevent irreparable injury to property, or to a property right, of the party making the application, for which injury there is no adequate remedy at law, and such property or property right must be described with particularly in the application, which must be in writing and sworn to by the applicant or by his agent or attorney.

And no such restraining order or injunction shall prohibit any person or persons, whether singly or in concert, from terminating any relation of employment, or from ceasing to perform any work or labor, or from recommending, advising, or persuading others by peaceful means so to do; or from attending at any place where any such person or persons may lawfully be, for the purpose of peacefully obtaining or communicating information, or from peacefully persuading any person to work or to abstain from working; or from ceasing to patronize or to employ any party to such dispute, or from recommending, advising, or persuading others by peaceful and lawful means so to do; or from paying or giving to, or withholding from, any person engaged in such dispute, any strike benefits or other moneys or things of value; or from peaceably assembling in a lawful manner,

and for lawful purposes; or from doing any act or thing which might lawfully be done in the absence of such dispute by any party thereto; nor shall any of the acts specified in this paragraph be considered or held to be violations of any law of the United States.

National Labor Relations Act, as amended

§7, 29 U.S.C. §157. Right of employees as to organization, collective bargaining, etc.

Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 158(a)(3) of this title.

§8(b), 29 U.S.C. §158(b) It shall be an unfair labor practice for a labor organization or its agents—

§8(b) 4, 29 U.S.C. §158(b) (4) (i) to engage in, or to induce or encourage any individual employed by any person engaged in commerce or in an industry affecting commerce to engage in, a strike or a refusal in the course of his employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any service ; or (ii) to threaten, coerce, or restrain any person engaged in

commerce or in an industry affecting commerce, where in either case an object thereof is—

(A) forcing or requiring any employer or self-employed person to join any labor or employer organization or to enter into any agreement which is prohibited by subsection 8(e) of this section;

(B) forcing or requiring any person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person, or forcing or requiring any other employer to recognize or bargain with a labor organization as the representative of his employees unless such labor organization has been certified as the representative of such employees under the provisions of section 159 of this title: *Provided;* That nothing contained in this clause (B) shall be construed to make unlawful, where not otherwise unlawful, any primary strike or primary picketing; * * *

§8(e), 29 U.S.C. §158(e) It shall be an unfair labor practice for any labor organization and any employer to enter into any contract or agreement, express or implied, whereby such employer ceases or refrains or agrees to cease or refrain from handling, using, selling, transporting or otherwise dealing in any of the products of any other employer, or to cease doing business with any other person, and any contract or agreement entered into heretofore or hereafter containing such an agreement shall be to such extent unenforcible and void: *Provided,* That nothing in this subsection shall apply to an agreement between a labor organization and an employer in

the construction industry relating to the contracting or subcontracting of work to be done at the site of the construction, alteration, painting, or repair of a building, structure, or other work: *Provided further,* That for the purpose of this subsection and subsection (b) (4) (B) of this section the terms "any employer", "any person engaged in commerce or an industry affecting commerce", and "any person" when used in relation to the terms "any other producer, processor, or manufacturer", "any other employer", or "any other person" shall not include persons in the relation of a jobber, manufacturer, contractor, or subcontractor working on the goods or premises of the jobber or manufacturer or performing parts of an integrated process of production in the apparel and clothing industry: *Provided further,* That nothing in this subchapter shall prohibit the enforcement of any agreement which is within the foregoing exception.

NORRIS-LAGUARDIA ACT

§1, 29 U.S.C. §101: Issuance of restraining orders and injunctions; limitation; public policy

No court of the United States, as defined in this chapter, shall have jurisdiction to issue any restraining order or temporary or permanent injunction in a case involving or growing out of a labor dispute, except in a strict conformity with the provisions of this chapter; nor shall any such restraining order or temporary or permanent injunction be issued contrary to the public policy declared in this chapter.

§2, 29 U.S.C. §102. Public policy in labor matters declared

In the interpretation of this chapter and in determining the jurisdiction and authority of the courts of the United States, as such jurisdiction and authority are defined and limited in this chapter, the public policy of the United States is declared as follows:

Whereas under prevailing economic conditions, developed with the aid of governmental authority for owners of property to organize in the corporate and other forms of ownership association, the individual unorganized worker is commonly helpless to exercise actual liberty of contract and to protect his freedom of labor, and thereby to obtain acceptable terms and conditions of employment, wherefore, though he should be free to decline to associate with his fellows, it is necessary that he have full freedom of association, self-organization, and designation of representatives of his own choosing, to negotiate the terms and conditions of his employment, and that he shall be free from the interference, restraint, or coercion of employers of labor, or their agents, in the designation of such representatives or in self-organization or in other concerted activities for the purpose of collective bargaining or other mutual aid or protection; therefore, the following definitions of and limitations upon the jurisdiction and authority of the courts of the United States are enacted.

§4, 29 U.S.C. §104.

No court of the United States shall have jurisdiction to issue any restraining order or temporary or permanent injunction in any case involving or growing out of any labor

dispute to prohibit any person or persons participating or interested in such dispute (as these terms are herein defined) from doing, whether singly or in concert, any of the following acts:

(a) Ceasing or refusing to perform any work or to remain in any relation of employment;

(b) Becoming or remaining a member of any labor organization or of any employer organization, regardless of any such undertaking or promise as is described in section 103 of this title;

(c) Paying or giving to, or withholding from, any person participating or interested in such labor dispute, any strike or unemployment benefits or insurance, or other moneys or things of value;

(d) By all lawful means aiding any person participating or interested in any labor dispute who is being proceeded against in, or is prosecuting, any action or suit in any court of the United States or of any State;

(e) Giving publicity to the existence of, or the facts involved in, any labor dispute, whether by advertising, speaking, patrolling, or by any other method not involving fraud or violence;

(f) Assembling peaceably to act or to organize to act in promotion of their interests in a labor dispute;

(g) Advising or notifying any person of an intention to do any of the acts heretofore specified;

(h) Agreeing with other persons to do or not to do any of the acts heretofore specified; and

(i) Advising, urging, or otherwise causing or inducing without fraud or violence the acts heretofore specified, regardless of any such undertaking or promise as is described in section 103 of this title.

FEDERAL DECLARATORY JUDGMENT ACT

28 U.S.C. §2201.

In a case of actual controversy within its jurisdiction, except with respect to Federal taxes, any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such.

Texas Business and Commerce Code:

§15.02 Trust Defined.

(a) In this section, unless the context requires a different definition, "person" does not include municipal corporation. (No source citation.)

(b) A "trust" is a combination of capital, skill, or acts by two or more persons to

(1) restrict, or tend to restrict, trade, commerce, aids to commerce, the preparation of tangible personal property for market or transportation, or the free pursuit of a lawful business; or

(2) fix, maintain, increase, or reduce the price of tangible personal property, the cost of insurance, or the cost of preparing tangible personal property for market or transportation; or

(3) prevent or lessen competition in

(A) the manufacture, transportation, sale or purchase of tangible personal property;

(B) the business of insurance;

(C) aids to commerce; or

(D) preparing tangible personal property for market or transportation, or

(4) affect, control, or establish the price of tangible personal property, or the cost of transportation, insurance, or preparing tangible personal property for market or transportation; or

(5) agree

(A) not to sell, dispose of, transport or prepare tangible personal property for market or transportation, or not to make an insurance contract, at a price below a common standard or figure;

(B) to maintain the price of tangible personal property, the charge for transportation or insurance, or the cost of preparing tangible personal property for market or transportation at a fixed or graded figure;

(C) to affect or maintain the price of tangible personal property or the cost of transportation, insurance, or preparing tangible personal property for market or transportation in order to preclude free competition between or among themselves or others in the sale or transportation of tangible personal property, in the business of transportation or insurance, or in preparing tangible personal property for market or transportation; or

(D) to pool, combine, or unite an interest they have in the sale or purchase of tangible personal property, or in the charge for transportation, insurance, or preparing tangible personal property for market or transportation, so that the price of the tangible personal property, or charge for transportation, insurance, or preparing tangible personal property for market or transportation might be in any manner affected; or

(6) regulate, fix, or limit the output of tangible personal property, or the amount of insurance undertaken, or the amount of work performed in preparing tangible personal property for market or transportation; or

(7) refrain from engaging in business, or from buying or selling tangible personal property, partially or entirely in this state.

Texas Business and Commerce Code:

§15.03 Conspiracy in Restraint of Trade Defined

(a) It is a conspiracy in restraint of trade for

(1) two or more persons engaged in buying or selling tangible personal property to agree not to buy from or sell to another person tangible personal property;

(2) two or more persons to agree to boycott, or threaten not to buy from or sell to, a person because that person buys from or sells to another person;

(3) two or more persons to agree to boycott, or not to deal with the tangible personal property of another person;

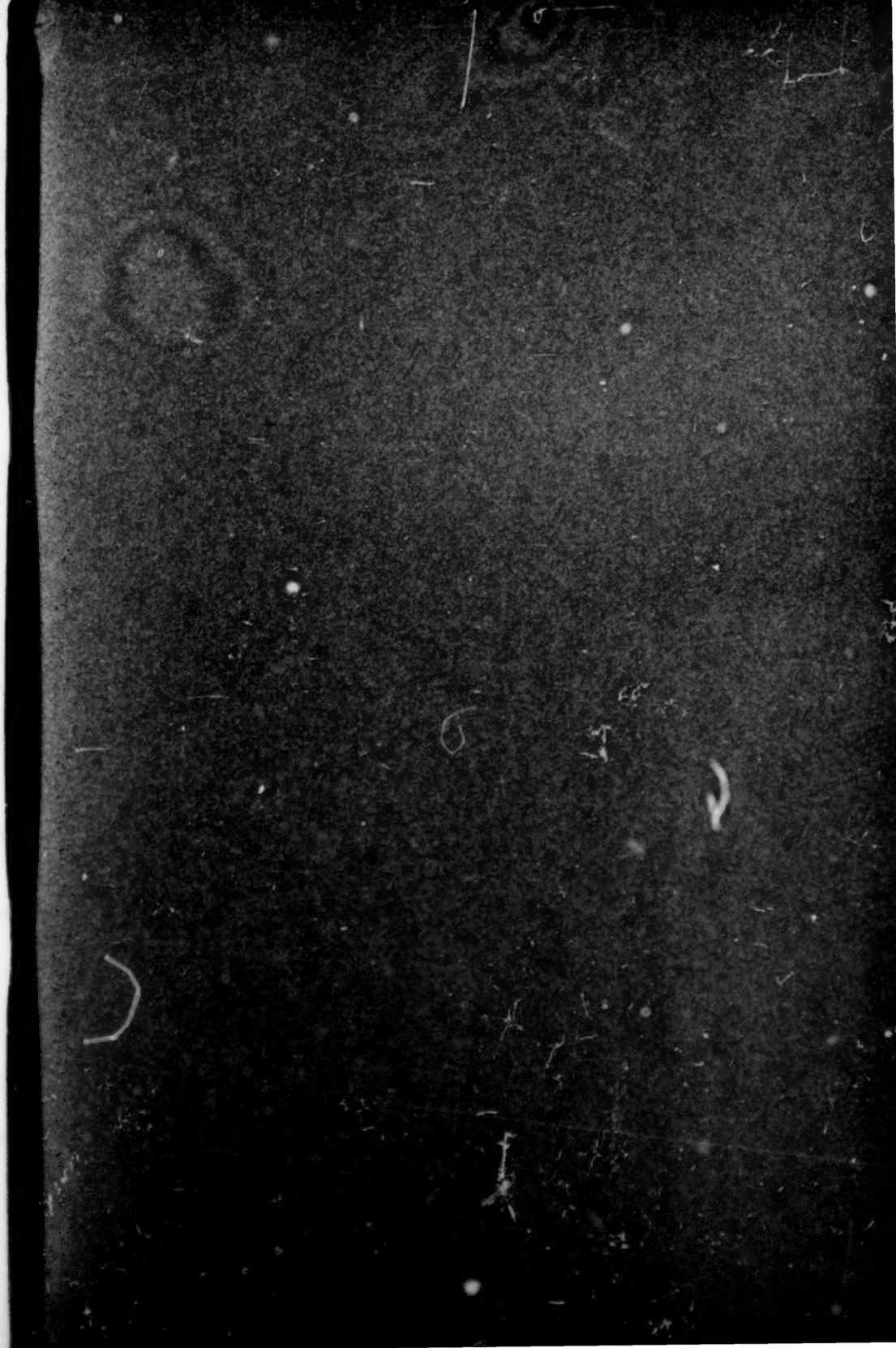
§15.03 (4) is not quoted.

Texas Business and Commerce Code

§15.04 Monopoly, Trust and Conspiracy in Restraint of Trade Prohibited; Agreement Violating Prohibition Void.

(a) Every monopoly, trust and conspiracy in restraint of trade, as defined in Sections 15.01, 15.02 and 15.03 of this code, respectively, is illegal and prohibited.

(b An agreement violating the prohibition against a monopoly, trust, or conspiracy in restraint of trade contained in Subsection (a) of this section is void and unenforceable in law or equity.



SEP 16
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-1256

CONNELL CONSTRUCTION COMPANY, INC.,
Petitioner,

versus

PLUMBERS AND STEAMFITTERS LOCAL UNION No. 100, etc.,
Respondent.

RESPONDENT'S BRIEF ON THE MERITS ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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STATEMENT OF THE CASE

Some matters of relevance were obscured in Connell's statement of case.

The Plaintiff's Contentions Below

Connell's complaint asserted that efforts by Local 100 to obtain from Connell an agreement to restrict subcontracting to unionized subcontractors violated state and federal antitrust laws. No claim was made

under either sections 301 or 303 of the Labor Act.[1] No claim for damages was made, as Connell sought only declaratory and injunctive relief (A. 32-3, 43). It was Connell's view that the subcontractor agreement "on its face" violated the antitrust laws (A. 48), and:

> "The complaint of Connell in this case contains no allegation of this union's participation in a scheme or conspiracy with a non-labor group to create a monopoly for that non-labor group. In fact, Connell bases its claim on the ground that this contract simply restricts the way in which it is free to carry out its business ... Further questioning by Connell's own counsel established clearly that plaintiff was basing its entire case on the theory that there was a sufficient antitrust violation because the union had restricted Connell in the way that it carried on its business." 483 F.2d at 1165

On appeal Connell has varied the approach somewhat, claiming that a "most favored nations" clause that was once a part of the area collective bargaining contract between Local 100 and the mechanical contractors association forms an integral part of its antitrust claim. The "most favored nations" clause in question (set forth at page 12, fn. 3 of Connell's Brief) was deleted during the June 1973 negotiations and no longer exists in any collective bargaining contract (between) Local 100 and the association.

---

[1] 29 USCA 185 and 187.

The Nature of the Contract Between Connell and Local 100

The contract which Local 100 sought, and obtained under protest from Connell, provided that the parties desired "to make an agreement applying in the event of subcontracting in accordance with Section 8(e) of the Labor-Management Relations Act," and further that as to on-site construction Connell would subcontract work within the trade jurisdiction of Local 100 only to firms "that are parties to an executed current, collective bargaining agreement with Local 100" (PL. Ex. 4 A. 62, 114). The agreement could be cancelled by either party upon ten days written notice. *Ibid.*

In seeking the agreement with Connell the union in its words, sought "to improve and protect wages and work opportunities" (PL. Ex. 2, A. 59, 110). Nonunion mechanical contractors in Dallas were "too numerous to enumerate" (A. 79) and Connell frequently subcontracted with such nonunion contractors (A. 52-3). One such firm with whom Connell regularly subcontracted was Texas Distributors (A. 108) a firm which Local 100 had unsuccessfully "tried to get a collective bargaining contract with" (A. 79).

The Decisions Below

The trial court concluded that the agreement sought by Local 100 was protected by the construction industry proviso to Section 8(e) and exempt from antitrust sanctions, under the rationale of *Suburban Tile v. Rockford Building Trades*, 354 F.2d 1 (7th Cir. 1965),

that "being authorized by Congress such a contract does not violate Federal Anti-Trust statutes" (A. 41). The Court of Appeals affirmed, without expressly deciding the 8(e) issue. It was the view of the majority that the union was "seeking an agreement involving a legitimate union interest," i.e. "to eliminate competition based on differences in labor standards and wages." 483 F.2d at 1167. The Court recognized that the "central reason that the union wants the agreement ... is that it will be helpful in organizing other subcontractors" *ibid*, and drew a parallel with its earlier *Cedar Crest Hats* decision[2] noting:

> It can readily be seen that construction unions have a direct interest in seeing that general contractors hire subs using union labor much as it is obvious that the hatters had a strong interest in seeing retailers buy for resale only union-made hats." 483 F.2d at 1168.

"Even if the anticompetitive aspects are weighed against the direct benefits," the Court thought it "difficult to find these goals illegitimate" *ibid*. For the only anticompetitive aspect as that the unions have succeeded in eliminating that feature of competition based on lower standards or wages." 483 F.2d at 1169. And although it did not pass upon the 8(e) question the opinion did note that "Congress explicitly recognized the legitimacy of these restrictions on subcontractors wherever the general contractor had union-

[2]*Cedar Crest Hats Inc. v. United Hatters*, 362 F.2d 322 (5th Cir. 1966).

ized employees of his own. The *anticompetitive* effect does not change that much when the general contractor has no employees of his own". 483 F.2d at 1168.

On this analysis the Court of Appeals majority concluded that "antitrust is not the proper method of handling this problem," 483 F.2d at 1169. With respect to the state antitrust contentions the Court of Appeals, as had the trial Court, disposed of them under the preemption rationale of *San Diego Building Trades v. Garmon*, 359 U.S. 236 (1959).

SUMMARY OF ARGUMENT

I

In *Suburban Tile Center v. Rockford Building Trades Council*, 354 F.2d 1, (7th Cir., 1965), which arose on facts indistinguishable from the present case, the court held that since the subcontracting agreement was lawful under §8(e) of the Labor Management Relations Act and since it was lawful to picket to obtain such an agreement under §8(b)(4)

> "it would be unreasonable to hold that success in securing such an agreement constitutes a violation of the anti-trust laws." *Id.* at 3.

Accordingly, we first address ourselves to Connell's contention that the subcontracting agreement herein is unlawful.

The issue turns on the meaning of §8(e) of the LMRA, added in 1959 to close what Congress regarded to be a "loophole" in the law against secondary boycotts. However, by two provisos to §8(e) Congress gave special consideration to the labor relations in the garment industry and the construction industry. Under the construction industry proviso, an agreement between a labor organization and "an employer in the construction industry relating to the contracting or subcontracting of work to be done at the site of the construction" is excused from §8(e) even though that contract sanctions secondary conduct.

Connell advances three arguments for removing the contract herein from the proviso. The first, that it is not an "employer in the construction industry" can be dismissed instantly because the Company is a general contractor in that industry and employs various trades. Connell argues more seriously that the agreement is unlawful because the union picketed to obtain it. That contention has been rejected by the Third, Sixth, Seventh, Ninth and District of Columbia Circuits; there are no Court decisions to the contrary. The Third Circuit explained that the proviso

> "was granted apparently in recognition of problems peculiar to the construction industry, particularly those resulting from sporadic work stoppages occasioned by the traditional refusal of craft unionists to work alongside non-union men on the same project." *Essex County and Vicinity District Council of Carpenters v. NLRB*, 332 F.2d 636, 640 (3rd Cir. 1964)

This Court citing *Essex* has agreed. *National Woodwork Mfr. v. NLRB*, 386 U.S. 612, 638-639 (1967). The *Essex* Court pointed out that a requirement that the agreement be entered into voluntarily is inconsistent with this expressed policy, is inconsistent with the broad general language of the proviso, and is inconsistent with §8(b)(4)(A) (as amended in 1959) which makes it unlawful only to picket to require an employer to enter into an agreement forbidden by §8(e).

Connell's final argument on this point is that the subcontracting agreement is not protected by the proviso because there was no collective bargaining relationship between the Company and the union. This proposed limitation on the proviso has also been authoritatively rejected. The General Counsel of the Labor Board has explained at length, in dealing with a charge arising out of this same activity by the same local union, that this contention is so clearly without legal merit as to not warrant the issuance of a complaint. See Appendix A, *infra*. In light of the purpose of the proviso stated by this Court in *National Woodwork*, following *Essex*, quoted *supra*, it is particularly significant that the General Counsel observed, contrary to Connell's present argument, that agreements such as the one in question were commonplace in the construction industry prior to 1959. See p. 24, *infra*.

II

While an agreement expressly protected by the proviso to §8(e) cannot be the basis of an antitrust violation, the converse does not hold. When Congress in

1947 determined to modify the effect of *United States v. Hutcheson*, 312 U.S. 219 (1941), insofar as that decision removed all sanctions from secondary boycotts, it deliberately chose not to reinstate the antitrust remedy which *Duplex Printing v. Deering*, 254 U.S. 443 (1921), had imposed. The House bill would have restored antitrust remedies through a provision (§12 of the Hartley Bill, H.R. 3020) making unlawful "a monopolistic strike or illegal boycott" and providing that the Norris-LaGuardia Act would have no application to "any action or proceeding in a court of the United States involving any activity" defined as unlawful in §12.

The Senate, however, refused to reinstate the antitrust remedy, instead, it provided for simple damages in a suit under a new §303 of the LMRA and for injunctions (under a new §10(1)) which could be obtained only at the instance of the Board. Senator Taft, on whose initiative this remedial compromise was achieved said:

> "Under the Sherman Act the same question of boycott damage is subject to a suit for damages and attorneys' fees. In this case we simply provide for the amount of the actual damages."
> II Leg. Hist. 1958, 1398*

*We throughout refer to the two volume histories of the Labor-Management Relations Act of 1947, and the Labor-Management Reporting and Disclosure Act of 1959, by volume and page, citing the former as Leg. Hist. 1947 and the latter as Leg. Hist. 1959.

These statements were regarded as authoritative by this Court in *Teamsters Local 20 v. Morton*, 377 U.S. 252, 260-261 (1964), in holding only compensatory damages could be obtained for a violation of the secondary boycott provision.

Again, in 1959, while Congress expanded the reach of the secondary boycott prohibition by rewriting §8(b)(4)(A) and adding §8(e), it expressly rejected (this time in the House) of attempts to revive antitrust remedies for such activities. Thus, as the law stands today, Congress has chosen the LMRA as the sole vehicle for regulating union secondary activity.

III

If we are right in urging in part I of this brief that the agreement in question is lawful, then Connell's antitrust agreement under state law is disposed of, in terms, by *Teamsters Local 24 v. Oliver*, 358 U.S. 283 (1959):

> "We believe that there is no room in this scheme for the application here of this state policy limiting the solutions that the parties' agreement can provide to the problems of wages and working conditions. * * * Of course, the paramount force of the federal law remains even though it is expressed in the details of a contract federal law empowers the parties to make, rather than in terms in an enactment of Congress. * * * Clearly it is immaterial that the conflict is between federal

labor law and the application of what the State characterizes as an antitrust law." *Id.* at 296-297.

And of course, even if the agreement is not protected by the proviso to §8(e), federal remedies would be exclusive. *Teamsters Local 20 v. Morton*, 377 U.S. 252 260-261. (1964)

ARGUMENT

Connell argues that union actions that violate the secondary boycott prohibitions of the Labor-Management Relations Act work a forfeiture of the labor exemption under the federal antitrust laws.[3] The company contends further that the union's picketing for the subcontractor clause in question did violate the secondary boycott provisions of the Labor-Management Relations Act because it was for the purpose of obtaining a contract prohibited by §8(e) of that Act. Rather than taking issue with Connell's assumption

[3]Connell does seek to embellish its argument by asserting the illegality of the "most favored nations" clause that was at one time contained in the agreement between the union and the Mechanical Contractors Association (of which Connell is not a member). That clause, which is set forth at page 12 of Connell's brief, is not in issue here, for two reasons. First, it did not appear in the subcontractor agreement between the actual parties to this case, and neither the Mechanical Contractors Association nor any of its members was before the courts below with any complaint under any statute. Moreover, that clause no longer exists. It was eliminated in the 1973 negotiations between the union and the Association. To the extent that Connell's arguments are posited upon the existence of that clause, the contentions are now moot. *Allee v. Medrano*, ____ U.S. ____, 94 S. Ct. 2191 (1974); *Golden v. Zwickler*, 394 U.S. 103 (1969).

that this antitrust case turns on the meaning of the LMRA, we assume such to be the case, and demonstrate below that Connell is wrong in both respects. We shall deal first with the company's minor premise and show that the construction industry proviso to §8(e) validates the subcontracting clause here, and, as the 7th Circuit stated: "It would be unreasonable to hold that success in securing such an agreement constitutes a violation of the antitrust laws," *Suburban Tile Center v. Rockford Building Trades Council*, 354 F.2d 1, 3 (7th Cir. 1965) cert. denied 384 U.S. 960 (1966). Thereafter, we treat with the company's major premise and show that Congress has determined that so-called "secondary" activity by labor unions is to be regulated solely by the LMRA and not through the antitrust laws. Finally, we shall show that the Petitioner's state antitrust claim is preempted by federal law — not under the primary jurisdiction doctrine of *San Diego Building Trades v. Garmon*, 359 U.S. 236 (1959), but as a matter of substantive supercession under *Teamsters Local 24 v. Oliver*, 358 U.S. 283 (1959).

I

I. The Subcontracting Agreement Is Lawful Under The Proviso To §8(e) Of The Labor Management Relations Act.

Section 8(b)(4)(A) of the LMRA as amended in 1959 and as it stands today states:

"(b) It shall be an unfair labor practice for a labor organization or its agents —

(4) (i) to engage in, or to induce or encourage any individual employed by any person engaged in commerce or in an industry affecting commerce to engage in, a strike or a refusal in the course of his employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services; or (ii) to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where in either case an object thereof is:

(A) *forcing or requiring any employer* or self-employed person to join any labor or employer organization or *to enter into any agreement which is prohibited by section 8(e);*" (emphasis added.)

And §8(e) of the LMRA also added in 1959 provides as follows:

"(e) It shall be an unfair labor practice for any labor organization and any employer to enter into any contract or agreement, express or implied, whereby such employer ceases or refrains or agrees to cease or refrain from handling, using, selling, transporting or otherwise dealing in any of the products of any other employer, or to cease doing business with any other person, and any contract or agreement entered into heretofore or hereafter containing such an agreement shall be to such extent unenforcible and void: *Provided, That nothing in this subsection (e) shall apply to an agreement between a labor organization and an employer in the construction industry relating to the contracting or subcontracting of work to be done at the site of the construction, alteration, painting, or repair of a building, structure, or other work:* Provided further, That for the purposes of this subsection (e) and section 8(b)(4)(B) the terms 'any employer', 'any person engaged in commerce or an industry affecting commerce', and 'any person' when used in relation to the terms 'any other producer, processor, or manufacturer', 'any other employer', or 'any other person' shall not include persons in the relation of a jobber, manufacturer, contractor, or subcontractor working on the goods or premises of the jobber or manufacturer or performing parts of an integrated process of production in the apparel and clothing industry: Provided further, That nothing in this Act shall prohibit the enforcement of any agreement which is within the foregoing exception." (Emphasis added.)

Sections 8(b)(4)(A) and 8(e) came into the Act in 1959 as part of Title VII of the Labor-Management Reporting and Disclosure Act of 1959 (LMRDA). They are a second stage in the evolution of the law of secondary boycotts, which were first prohibited by the original §8(b)(4)(A) of the Taft-Hartley Act, adopted in 1947. See pp. 34 to 40, *infra*. There has been much debate as to the reach of this prohibition. (See e.g.

National Woodwork Manufacturers v. NLRB, 386 U.S. 612 (1967).) But the present case involves nothing approaching the controversy which divided the Court in *National Woodwork*. For, here the subcontracting clause is concededly secondary. In contrast, the issue in *National Woodwork* was whether the "work preservation" clause there was primary or secondary. (386 U.S. at 644-646). One distinction in the construction industry between a lawful "secondary" clause, and a primary clause is that the latter may be enforced by strike and picket activity while the former may not. Compare *National Woodwork, id.*, with *Local Union No. 48 Sheet Metal Workers v. Hardy Corp.*, 332 F.2d 682 (5th Cir. 1964).

The agreement challenged by Connell is clearly between "an employer in the construction industry," Connell, and a "labor organization," Respondent Local 100. It relates only to "the contracting or subcontracting of work to be done at the site of the construction *** of a building, structure, or other work." It is therefore protected by the "construction industry" proviso to §8(e). Finally, since the agreement is protected by that proviso to §8(e) picketing to secure it is lawful. For, §8(b)(4)(A) prohibits only picketing requiring an employer to enter into "any agreement which is prohibited by §8(e)."

In urging the contrary, Connell asserts that it is not an "employer *vis a vis* union, for the purposes of the ... proviso." (Pet. Br. p. 34). But this contention is frivolous because Connell is a general contractor employing carpenters, laborers, bricklayers (A. 53). Indeed, the company's argument is self-defeating. It does not, and could not argue that it is not in the construction industry. And if it is not an "employer" for the purposes of the proviso to §8(e) then it would not be an "employer" within the prohibition of the body of the section and on that alternative basis, the agreement here would be lawful.

Connell makes the additional argument that the contract is not protected by the construction industry proviso because it was obtained by picketing rather than through the company's voluntary acquiesence. (Pet. Br. 35). This contention has been squarely rejected by the Courts of Appeals that have confronted the point, as well as by the National Labor Relations Board. *Construction, Production & Maintenance Laborers Union, Local 38 v. NLRB*, 323 F.2d 422 (9th Cir. 1963); *Essex County and Vicinity District Council of Carpenters v. NLRB*, 332 F.2d 636 (3rd Cir. 1964); *Orange Belt District Council of Painters No. 48 v. NLRB*, 328 F.2d 534 (D.C. Cir. 1964); *NLRB v. Muskegon Bricklayers Union*, 378 F.2d 859 (6th Cir. 1967); *Suburban Tile Center v. Rockford Building Trades Council*, 354 F.2d 1 (7th Cir. 1965); *North-Eastern Indiana Building and Construction Trades Council (Centlivre Village Apartments)*, 148 NLRB 854 (1964).

Perhaps the most concise, yet complete, statement of the reasons for this unanimity is the 3rd Circuit's opinion in *Essex County Carpenters, supra*. That Court first explained the background to the adoption of §§8(b)(4)(A) and 8(e):

"It seems essential to the proper construction of the applicable statutory provisions that we first consider the law as it was, and as it applied to the construction industry, prior to the amendments of 1959. Section 8(b) (4) (A) of the Act of 1947, 29 U.S.C.A. § 158(b) (4) (A), declared it an unfair labor practice for a labor organization 'to engage in, or to induce or encourage the employees of any employer to engage in, a strike or a concerted refusal in the course of their employment to use, * * * transport, or otherwise handle or work on any goods, articles, materials, * * * where an object thereof is: (A) forcing or requiring any employer * * * to cease using, selling, handling * * * the products of any other producer, processor, or manufacturer, or to cease doing business with any other person; * * *.'

In June of 1951, the Supreme Court, construing the quoted provision, held that a strike, an object of which was to coerce a general contractor to terminate a subcontract held by another employer engaged in the performance of electrical work at the construction site, was an unfair labor practice within the meaning of the statute. National Labor Relations Board v. Denver Bldg. & Const. Trades Council, 341 U.S. 675, 685-692. Approximately seven years later the Court held that a boycott voluntarily engaged in by a secondary employer for his own business reasons, and pursuant to the terms of a hot cargo clause contained in a col-

lective bargaining agreement, was not an unfair labor practice within the meaning of the said section. Local 1976, United Brotherhood of Carpenters, etc., v. National Labor Relations Board, 357 U.S. 93, 98-104. It was further held that a union [was] free to approach an employer to persuade him to engage in a boycott, so long as it refrains from the specifically prohibited means of coercion through inducement of employees. Ibid, 99. However, the court went on to hold that it was an unfair labor practice for a labor union to encourage or induce a strike or a concerted work stoppage to enforce compliance with the hot cargo clause. Ibid, 105-111. It should be noted that in this case the clause provided that employees 'shall not be required to handle non-union material.'

The widespread resort to the hot cargo clause as a means to circumvent the prohibitions of § 8(b) (4) (A), particularly by the Teamsters Union, led to the enactment of the amendments with which we are here concerned. See Vol. II, Leg. Hist. of the Labor-Management Reporting and Disclosure Act of 1959, 1433, 1707-1709; 2 U.S.Code Cong. and Admin.News (1959), pp. 2382-2384."

After setting out the language of the applicable portions of the Act, the *Essex County Carpenters* Court continued:

"The quoted subsection makes it an unfair labor practice for a union and an employer 'to enter into any contract or agreement, * * * whereby such employer ceases or refrains or agrees to cease or refrain from handling, using, * * * transporting or otherwise dealing in' the products of any other producer or manufacturer. The effect of this provision of subsection (e) was to outlaw all hot cargo clauses containing the proscribed conditions, including those voluntarily agreed upon by the union and the employer. To this extent only the decision of the Court in Local 1976, United Brotherhood of etc. Carpenters v. National Labor Relations Board, supra, 98-104, was nullified. Section 8(b) (4) (A) makes it an unfair labor practice for the union to engage in, or to induce or encourage the employees to engage in, specifically proscribed conduct where an object is to force or require an employer to enter into any such contract or agreement.

The same subsection declares it an unfair labor practice for 'a union and an employer 'to enter into any contract or agreement' whereby such employer agrees 'to cease doing business with any other person.' However, the proviso creates an exemption applicable in the construction industry but restricted in its application to agreements relating to 'contracting or subcontracting * * * work' to be performed at the construction site. *This limited exemption was granted apparently in recognition of problems peculiar to the construction industry, particularly those resulting from sporadic work stoppages occasioned by the traditional refusal of craft unionists to work alongside non-union men on the same project.* The exemption does not extend to other agreements such as those relating to subcontracts for supplies and materials to be transported to and delivered on the construction site. These agreements are covered by the provisions discussed in the foregoing paragraph." (Emphasis added.)

In *National Woodwork*, this Court, citing *Essex County Carpenters*, assigned the same purpose to the proviso:

> "On the other hand, if the heart of § 8(e) is construed to be directed only to secondary activities, the construction proviso becomes, as it was intended to be, a measure designed to allow agreements pertaining to certain secondary activities on the construction site because of the close community of interests there, but to ban secondary-objective agreements concerning nonjob-site work, in which respect the construction industry is no different from any other." 386 U.S. at 638, 9

Having traced the history of §8(b)(4)(A), and explained both Congress' reaction, and the purposes that motivated both the prohibition and the "limited exemption" for the construction industry, the 3rd Cir-

cuit confronted the precise argument Connell advances here, viz:

> "that the proviso must be construed as applicable only to a voluntary agreement between the union and an employer. With this contention as a premise, it is argued that resort to specifically proscribed activity as a means to obtain a clause, otherwise legal under subsection (e), is an unfair labor practice within the meaning of § 8(b) (4) (A)."

The Third Circuit responded:

> "The argument has been rejected by each court which has thus far considered it. The fallacy in the argument lies in its erroneous premise. There is nothing in the language of the statute from which it may be inferred that it was the Congressional intent to restrict the exemption to voluntary contracts. The critical phrase in the proviso reads as follows: 'nothing in this subsection shall apply to AN agreement.' (Emphasis supplied.) If it had been the intent of Congress to limit the application of the proviso, it could have manifested this intent simply by substituting the qualifying words 'a voluntary' for the indefinite article 'an.'
>
> "It is further argued that the Board's construction of the provisions here in question is supported by the legislative history. The specific reference is to isolated phrases and sentences quoted out of context. The pertinent legislative history as a whole, as we interpret it, gives no support to the Board's argument. Vol. I, Leg. Hist. of the Labor-Management Reporting and Disclosure Act of 1959, 943-944; Vol. II, Ibid, 1433, 1707-1709. * * *
>
> "Section 8(b)(4)(A) as amended declares it an unfair labor practice for a union to engage in any activity therein proscribed where an object is to force or require an employer to enter into an agreement prohibited as 'unenforcible and void' by subsection (e). However, since the effect of the proviso was to preclude the application of subsection (e) to labor-management agreements relating to subcontracts for work to be performed at the construction site, coercive activity, otherwise illegal, may be employed to obtain such a contract. We should add that such an agreement is not a defense to an unfair labor practice charge made under § 8(b) (4) (B). Local 1976, United Brotherhood of etc. Carpenters v. National Labor Relations Board, Ibid, 105-111. To this extent, there has been no change in the law."

The only points made by Connell here and not dealt with in terms in *Essex County Carpenters*, had earlier been rejected by the Ninth Circuit in *Construction Laborers Union, supra*. In that case, too, it was argued that:

> "the proviso 'is not intended to change the law with respect to * * * the legality of a strike to obtain such a contract.' It argues that this adopts by implication as the 'existing law' the decision in N.L.R.B. v. Local 47, International Brotherhood of Teamsters (5 Cir., 1956), 234 F.2d 296."

The Ninth Circuit replied:

> "We cannot agree that that ruling constituted 'existing law' in the view of Congress. The phrase quoted from the legislative history is obviously vague and ambiguous. The Local 47 decision is nowhere cited in the legislative history of the 1959 amendments. To refer to it as 'existing law' seems exaggerated to say the least, since it is the only case dealing with this issue and since it preceded the Sand Door case and was not mentioned in the Supreme Court's opinion in that case. Moreover, it is distinguishable in that there was evidence demonstrating a specific intent of the picketing unions to force immediate termination of relations with certain non-union subcontractors." 323 F.2d at 425

Indeed, the Board's decision in *Local 47, Teamsters,* 112 NLRB 923, 925 n.2 (1955), specifically reserved the question.

> "Whether the Union's picketing also violated 8(b)(4)(A) insofar as it sought to regulate fu-

> ture dealings by Bateson and McCann with such subcontractors (not as yet identified) as might refuse to meet the Union's wage standards, is a question which we need not and do not decide."

Finally, Connell relies on an analogy to §8(f), whereby Congress did validate only pre-hire agreements voluntarily assumed. The *Construction Laborers Union* Court found the analogy wanting since "the legislative history [of §8(f)] contains statements specifically disclaiming an intention thereby to authorize strikes or picketing to coerce such prehire agreements." 323 F.2d at 425. In contrast there is no such legislative history concerning §§8(b)(4)(A) & 8(e). Presumably if Congress had intended to similarly condition §8(e), it would have similarly "disclaimed" in the legislative history. Indeed, the argument that picketing to secure a §8(e) proviso clause is unlawful, ignores the basic fact that the picketing here at issue is controlled by §8(b)(4)(A), the operation of which expressly depends on unlawfulness under §8(e), and which does not invalidate picketing to secure a subcontracting clause that is *not* prohibited by §8(e).

Connell argues further that the subcontracting proviso is not protected by the §8(e) proviso because it was not made in a collective bargaining relationship.[4]

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[4]Connell's argument is somewhat akin to that rejected by the Court in *Retail Clerks v. Lion Dry Goods*, 369 U.S. 17, 25 (1962) when it was urged that Section 301 jurisdiction was limited to "agreements concerning wages, hours . . . concluded in direct negotiations between employers and unions entitled to recognition as exclusive representatives of employees."

(Pet. Br. p. 41-42). On April 23, 1974, the NLRB's General Counsel, after thoroughly reviewing the relevant "Supreme Court and Circuit Court decisions, relevant legislative history and the Board's post-*Centlivre* [148 NLRB 154] decision[s]", found that these so completely disposed of this contention that there remained "no basis to establish under current Board law, violations of either Section 8(e) or 8(b)(4)(A) of the Act." For as the District of Columbia Circuit has stated "even picketing is permissible if the coverage of the proposed contract is limited to the type of work which is never performed by the general contractors' own employees" *Dallas Building and Construction Trades Council v. NLRB*, 396 F.2d 677, 682 (D.C. Cir. 1968). The General Counsel has therefore refused even to issue a complaint to test the matter further. We have appended his decision hereto as Appendix A.

The company's argument rests in part on Senator Kennedy's statement that the §8(e) proviso was enacted "to avoid damage to the pattern of collective bargaining in the industry" (Pet. Br. p. 42), and Congressman Frelinghuysen's identical statement in the House (Pet. Br. at 41). But the company's undocumented assertions (Pet. Br. p. 42) regarding the pattern of collective bargaining in the construction industry[5]

[5]At least as early as the 1930's building trades unions have sought to obtain agreements or understandings with general contractors not to subcontract their work to nonunion employers. See *Levering and Garrigues Company v. Morrin*, 71 F.2d 284 (2nd Cir. 1934) cert. denied 293 U.S. 595 where the Ironworkers union sought to induce "owners, architects, or general contractors to let no subcontracts to plaintiffs for the erection of structural iron and steel on buildings," because the plaintiffs

are refuted by what the General Counsel said on this same point:

> "Organizing in the building and construction industry both prior to and subsequent to the 1959 amendments, was and is primarily carried on by building and construction trades councils on behalf of their constituent craft locals. The building trades agreements proffered are not conventional collective-bargaining agreements, nor is a conventional collective-bargaining relationship sought, but rather an attempt is made to obtain skeleton agreements (containing little more than subcontracting provisions) which in turn are augmented by the execution of collective-bargaining agreements by the individual trade unions, the latter agreements containing provisions governing wages and other substantive conditions of employment. As the Court observed in *Dallas Building and Construction Trades Council* v. *N.L.R.B.*, 396 F.2d 677 (C.A. D.C.), at p. 682:
>
> ". . Congress intended by means of Section 8(e) to preserve the status quo of bargaining in the construction industry; and in 1959 'umbrella' agreements like the one

were members of an open shop organization. See generally, 84 Monthly Labor Review No. 7 at 716 (July 1961), where the Department of Labor found before 1959 "a large group of construction industry contracts which required the subcontractor to be under agreement with the same local with another local of the same international union, with a recognized building trades union or with an AFL-CIO affiliate."

> proposed here were, as they are today, commonplace, for collective-bargaining is traditionally conducted at several levels in the construction industry . . ."

Under this arrangement the building and trades council is as much as a "stranger" to the general contractor and his employees, if any, as the Plumbers Union was to Connell. The subcontracting clause encased in such a trades council "shell" agreement can no more be said to be obtained in the context of a collective-bargaining relationship than the proviso agreement sought or obtained in such cases as *Colson and Stevens, supra, Centlivre, supra,* and *Church's Fried Chicken, supra.*[6]

[6]A recent decision, *Danielson v. Ladies Garment Workers Joint Board*, 494 F.2d 1230 (2nd Cir. 1974), deals with the garment industry proviso to 8(e). The ILGWU had picketed a manufacturer for a jobbers' agreement which, as the Plumbers' agreement here, disclaimed any application to the employer's own employees and any desire for recognition. The ILGWU agreement prohibited the jobber from contracting with any employers who were not under a contract with the union. The Court in an appeal from grant of a 10(L) injunction, reversed, holding that "this kind of picketing in the garment industry comes within the policy exemption provided by the Congress in Section 8(e)." The Board has now also considered the underlying facts in the *Danielson* case and held "the purpose of the Respondent's picketing was to force Hazantown to agree to use contractors who had recognized and bargained with the Respondent as a representative of their employees, an object which we find to be protected by the garment industry proviso contained in Section 8(e), and not in any way prohibited under Section 8(b)(7)" *Joint Board of Garment Workers*, 212 NLRB No. 106 (Aug. 8, 1974).

Perhaps because it was not cited to him, the General Counsel did not deal with the statement of Senator McNamara on which petitioner also relies (Pet. Br. p. 41). In the paragraph immediately preceding the passage cited by Petitioner, Senator McNamara said: "This proviso embraces and covers all forms of contracting or subcontracting clauses in agreements between building and construction contractors and building trades unions with respect to work to be done at the job-site." II Leg. Hist. 1959, 1815. That is the exact proposition for which we contend. Senator McNamara's reference to agreements between plumbers locals and "their contractors" concerns a specific application of that general proposition — and not the meaning of the 8(e) proviso. It is clear both from the salient portion of his statement, which Petitioner omits, and from the context of his entire remarks that Senator McNamara was not suggesting the proviso covered only agreements between plumbing contractors and "unions representing their employees" (Pet. Br. p. 41).

Of course, the language of § 8(e) itself gives no comfort to the company's argument. For the term "agreements' 'is unmodified,[7] and as we have noted above, the only conditions for the proviso's application with respect to the parties thereo, are that one a labor organization and the other an "employer in the

[7]Compare, "Congress knew well the phrase 'collective bargaining contracts' . . had Congress contemplated a restrictive differentiation, we may assume that it would not have eschewed 'collective bargaining contracts' unwittingly." *Retail Clerks v. Lion Dry Goods*, 369 U.S. 17, 25 (1962).

construction industry." To read a further limitation into the term "agreement" would be anomalous because the same term is used in the main portion of § 8(e), which declares the broad prohibition applicable to all but two industries. If the term "agreement" were qualified as suggested by Connell, it would presumably be lawful for the Teamsters to enter into an agreement with an employer, who hires no Teamsters, whereby that employer promises, for example, not to ship freight with non-union motor carriers. This would introduce a new "loophole" into the statute which we do not have the temerity to advance. The only basis on which the company's argument could be accepted is that the term "employer" has different meanings in the main portion of §8(e) and in its construction industry proviso. This Court's unanimous holding with respect to another of the 1959 amendments to the secondary boycott provisions of the LMRA is responsive here.

> It would fall far short of achieving this basic purpose if the proviso applied only in situations where the union's labor dispute is with the manufacturer or processor. Moreover, a primary target of the 1959 amendments was the secondary boycotts conducted by the Teamsters Union, which ordinarily represents employees not of manufacturers, but of motor carriers. There is nothing in the legislative history which suggests that the protection of the proviso was intended to be any narrower in coverage than the prohibition to which it is an

> exception, and we see no basis for attributing such an incongruous purpose to Congress. *NLRB* v. *Servette*, 377 U.S. 46, 55 (1964) (footnote omitted)

The foregoing shows that Connell's §8(b)(4)(A) and §8(e) argument rests on a misreading of the terms "employer" and "agreement" in the §8(e) proviso. Once those terms are given their natural and proper construction it is plain that this case is indistinguishable from *Suburban Tile Center, supra*, 354 F.2d 1. There plaintiffs brought an antitrust claim premised on the view that the successful use of economic force to secure a subcontracting agreement violates the antitrust laws. In the *Suburban Tile* complaint the:

> "Plaintiffs assert that defendant Building Contractors Association of Rockford, Inc., which represents a majority of the contractors and sub-contractors engaged in the construction industry and various allied industries in Winnebago County, Illinois, (hereinafter sometimes called the 'Contractors' Association') entered into an agreement with defendant Rockford Building and Construction Trades Council of Rockford, Illinois, Winnebago County (which consists of representatives of about twenty local unions, including defendant United Brotherhood of Carpenters and Joiners of America, Local 792 of Rockford Illinois, and the Marble, Tile and Terrazzo Workers, Members of Subordinate Union #31

of Rockford, Illinois) hereinafter sometimes called the 'Trades Council.'

"Plaintiffs further allege that the agreement precluded the signatory contractors from contracting for work commonly done by the craft union members of the Trades Council with anyone who does not have a collective bargaining agreement with the Trades Council or the local craft union (affiliated with the Trades Council) which commonly has jurisdiction over the class of work involved. The agreement provided that any contractor who was not a member could receive the benefits and assume the obligations of the agreement by signing an exact copy of it.

"The plaintiffs assert that defendant Suarez Brothers Construction Co., Inc., (hereinafter sometimes called 'Suarez Bros.') became a party to the alleged unlawful conspiracy by signing what was in effect an exact duplicate of the agreement on or about June 21, 1963. There was a prior similar collective bargaining agreement entered into between Suarez Bros. and the Trades Council on November 9, 1962, with reference to 'the construction of apartment buildings project, west of Machesney Airport, Rockford, Illinois.'

"On or about May 6, 1963, plaintiff Suburban Tile Center, Inc., with its principal offices in Cook County Illinois, (hereinafter sometimes

called 'Suburban Tile') entered into an agreement with Suarez Bros. as general contractor, to sell and install prefabricated tile at an apartment building project west of the Machesney Airport, Rockford, Illinois, known as the 'Presidential Courts Project.'

"Plaintiffs assert that because of threats of such steps as work stoppages and lawsuits, by members of the local unions affiliated with the Trades Council, Suarez Bros. entered into the above-mentioned agreement of June 21, 1963.

"Thereafter, the Trades Council sought and secured a court injunction from the Circuit Court of Winnebago County, Illinois, permanently enjoining Suarez Bros. from hiring or subletting work to persons or firms having no collective bargaining agreement with the Trades Council or its union affiliates. Suarez Bros. then directed plaintiff Suburban Tile to cease doing the work at the Presidential Courts Project site." (*Id.* at 2-3.)

The Seventh Circuit rejected that anti-trust claim because:

"A construction subcontracting agreement has been held to be a mandatory subject of collective bargaining. Orange Belt District Council of Painters No. 48, AFL-CIO v. N.L.R.B., 1964, 117 U.S. App. D.C. 233, 328 F.2d 534, 537; Building and Construction Trades Council of San

> Bernardino & Riverside Counties v. N.L.R.B., 1964, 117 U.S. App. D.C. 239, 328 F.2d 540. Economic action to secure such agreements has been allowed. Essex County and Vicinity District Council of Carpenters etc. v. N.L.R.B., 3 Cir., 1964, 332 F.2d 636, 641; Construction, Production & Maintenance Laborers Union, Local 383, AFL-CIO v. N.L.R.B., 9 Cir., 1963, 323 F.2d 422, 425. In the face of these decisions, it would be unreasonable to hold that success in securing such an agreement constitutes a violation of the anti-trust laws."

That court was correct both on the governing LMRA law and the consequence of that law for antitrust claims such as the one made here.

II. Even If The Subcontracting Agreement Were Illegal Under The National Labor Relations Act, This Would Not Give Rise To A Violation Of The Anti-Trust Laws.

We accept as essentially accurate Connell's description of the history of the labor exemption up until 1947, particularly its recognition that the pivotal decision in *United States* v. *Hutcheson*, 312 U.S. 219 (1941) "involved a jurisdictional dispute that caused the losing union to institute a secondary boycott" and that this Court "held the secondary boycott of *Hutcheson* immune from the anti-trust laws" (Pet. Br. pp. 19-20).[8]

[8]As appears from both the opinion of the Court (*id.* at 227-228) and the concurring opinion of Justice Stone (*id.* at 237-238) the indictment charged the union with both a jurisdictional dispute and a secondary boycott. In holding that this conduct could not, given the Norris-LaGuardia Act, be punished under the Sherman Act, the Court held:

> "The Norris-LaGuardia Act removed the fetters upon trade union activities, which according to judicial construction § 20 of the Clayton Act had left untouched, by still further narrowing the circumstances under which the federal courts could grant injunctions in labor disputes. More especially, the Act explicitly formulated the 'public policy of the United States' in regard to the industrial conflict, and by its light established that the allowable area of union activity was not to be restricted, as it had been in the Duplex case, to an immediate employer-employee relation. Therefore, whether trade union conduct constitutes a violation of the Sherman Law is to be determined only by reading the Sherman Law and § 20 of the Clayton Act and the Norris-LaGuardia Act as a harmonizing text of outlawry of labor conduct." (*Id.* at 231; footnote omitted)

Where Connell goes seriously astray is in its reading of the following passage in *National Woodwork:*

> "In effect Congress, in enacting 8(b)(4)(A) of the Act, returned to the regime of *Duplex Printing Co.* and *Bedford Cut Stone.* Id. at 632." (Pet. Br. p. 20)

Connell's error is that it fails to appreciate that while Congress in 1947 may have returned to the substantive law of the *Duplex* and *Bedford* cases, it deliberately chose not to utilize the anti-trust laws but rather elected to regulate secondary boycotts through remedies Congress established under the Labor Manage-

ment Relations Act.[9] An examination of the course of this issue through the legislative process will demonstrate that Congress carefully considered the anti-trust remedy and expressly rejected it.

The Taft-Hartley Bill of 1947

On April 17, 1947, the House passed and sent to the Senate H.R. 3020 (the Hartley Bill) (I Leg. Hist. 1947, 863). Section 12 of the bill defined "unlawful concerted activities" to include a "monopolistic strike, or illegal boycott," and provided that the Norris-LaGuardia Act should have no application to "any action or proceeding in a court of the United States involving any activity" defined as unlawful in Section 12. (Id. at 204-6). House Report 245, which accompanied the bill, explained that illegal boycotts included "direct restraints of trade designed to compel people against whom they are engaged in to place their business with some other than those they are dealing with at the time..." Id. at 315. The report explained the underlying purpose of Section 12:

> "Under this section, these practices are called by their correct name, 'unlawful concerted activities.' It is provided that any person injured in his person, property, or business by an unlawful concerted activity affecting commerce

[9]This is an instance in which "the longtime failure of Congress to alter the Act after it had been judicially construed, and the enactment by Congress of legislation which implicitly recognizes the judicial construction as effective, is persuasive of legislative recognition that the judicial construction is the correct one," *Apex Hosiery v. Leader*, 310 U.S. 469, 488 (1940).

> may sue the person or persons responsible for the injury in any district court having jurisdiction of the parties and recover damages. The bill makes inapplicable in such suits the Norris-LaGuardia Act, which heretofore has protected parties to industrial strife from the consequences of their lawlessness, no matter how violent their disputes became." Id. at 335.

The same issue was considered in the Senate Committee on Labor and Public Welfare. That Committee also decided to outlaw secondary boycotts, but did not propose excepting them from Norris-LaGuardia. Instead, the Senate Committee provided that the secondary boycott would be an unfair labor practice and that such boycotts could be enjoined on application of the National Labor Relations Board. No provision for private suits, either for injunctive relief or for damages, was included in the bill as reported to the Senate. Senate Report No. 105 which accompanied Senate Bill 1126 framed the issue:

> "The problem of the inadequacy of existing laws on industrial relations is one of grave national concern. The basic Federal law on this subject is contained in two statutes — the Norris-LaGuardia Act of 1932 and the National Labor Relations Act of 1935...
>
> While the committee does not believe that social gains which industrial employees have received by reason of these statutes should be impaired in any degree, *we do feel that to the*

extent that such statutes, together with the regulations issued under them, and decisions regarding them, have produced specific types of injustice, or clear inequities between employers and employees, Congress should remedy the situation by precise and carefully drawn legislation.

* * *

The need for such legislation is urgent. *Supreme Court interpretations of the Norris-LaGuardia Anti-injunction Act and the Clayton Act seem to have placed union activities, no matter how destructive to the rights of the individual workers and employers who are conforming to the National Labor Relations Act, beyond the pale of Federal law.*

* * *

After a careful consideration of the evidence and proposals before us, the committee has concluded that five specific practices by labor organizations and their agents, affecting commerce, should be defined as unfair labor practices. Because of the nature of certain of these practices, especially jurisdictional disputes, and secondary boycotts and strikes for specifically defined objectives, the committee is convinced that additional procedures must be made available under the National Labor Relations Act in order adequately to protect

the public welfare which is inextricably involved in labor disputes." I Leg. Hist., 1947, 407-8 (emphasis added)

In supplemental views, four members of the Committee, including Senators Taft and Ball, declared their intention to offer specific floor amendments one of which in their words:

> "removes the protection of the Clayton Act from monopoly agreements to fix prices, allocate customers, restrict production, distribution, or competition, or impose restrictions or conditions on the purchase, sale, or use of material, machines, or equipment. While the existence of the union should not be a combination in restraint of trade, we see no reason why unions should not be subject in this field to the same restriction as are competing employers." I Leg. Hist. 1947, 456, 461-2.

In conformity with his expressed intent, during the course of floor debate, Senator Ball offered an amendment[10] which he described as:

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[10]The Ball Amendment provided in part:

"(d) The provisions of sections 6 and 20 of the act entitled 'An act to supplement existing laws against unlawful restraints and monopolies, and for other purposes.' approved October 15, 1914, and the provisions (except sec. 7, exclusive of clauses (c) and (e) and secs. 11 and 12) of the act entitled 'An act to amend the Judicial Code and to define and limit the jurisdiction of courts sitting in equity, and for other purposes.' approved March 23, 1932, shall not be applicable in respect of violations of subsection (a) [subsection (a) defined the proscribed secondary boycotts] or in respect of any

> "... designed to correct the interpretation of the Norris-LaGuardia and Clayton acts made by the Supreme Court in the Hutchinson (sic) case and a number of other cases brought by former Assistant Attorney General Thurman Arnold, when he attempted to break up monopolistic practices on the part of labor unions, sometimes acting on their own, sometimes in conspiracy with employers." II Leg. Hist. 1947, 1354

Senator Taft, however, opposed the Ball amendment, explaining his opposition:

> "My views on the subject of the Ball amendment are stated in the supplemental views found on page 4 of the majority report. I do not change those views. However, in the progress of the consideration of a bill the Senator in charge of it should judge the temper of the Senate and the action which should be taken. I found that opposition to restoring the injunctive process even in cases of secondary boycotts and jurisdictional strikes, seemed to be so strong, and I am so anxious to retain provisions covering the right of direct action in

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contract, combination, or conspiracy, in restraint of commerce, to which a labor organization is a party, if one of the purposes of such contract, combination, or conspiracy is to fix prices, allocate customers, restrict production, distribution, or competition, or impose restrictions or conditions upon the purchase, sale or use of any material, machines, or equipment." Id. at 1324.

> suits brought for damages in cases of that kind, that I have determined that I shall vote against the Ball amendment and then offer the substitute, which provides for direct suits in cases of secondary boycott." II Leg. Hist. 1947, 1365.

In subordinating his personal views to the practical necessity of securing sufficient votes in the context of "a predictable Presidential veto", *Pipefitters Local v. U.S.*, 407 U.S. 385, 409 (1972). Senator Taft performed a leadership function which this Court has repeatedly recognized. See this Court's adoption of Senator Taft's limiting constructions of 8(b)(1)(A), *NLRB v. Drivers Local Union No. 639*, 362 U.S. 274, 287-288, (1960) and *NLRB v. Allis-Chalmers*, 388 U.S. 175, 185-190 (1967), of the reach of 8(b)(6), *ANPA v. NLRB*, 345 U.S. 100, 106-111 (1953); see *Florida Power & Light Co. v. Electrical Workers*, ____ U.S. ____, 94 S.Ct. 2737, 2744 (1974).

The Ball Amendment was defeated by a vote of 62-28 (II Leg. Hist. 1947, 1369-1370).

Senator Taft, as promised, promptly offered his amendment which contained what ultimately became §303 of the Act. He made clear that the effect of his bill "is only to restore to people who lose something because of boycotts and jurisdictional strikes the money which they have lost." II Leg. Hist. 1947, 1371. When Senator Morse objected to potential liabilities for unions under §303, Senator Taft contrasted the remedy provided under his amendment with that of the Sherman Act:

> "Under the Sherman Act the same question of boycott damage is subject to a suit for damages and attorneys' fees. In this case we simply provide for the amount of the actual damages." II Leg. Hist. 1947, 1398.

These statements by Senator Taft have previously been cited by this Court as authoritatively establishing the Congressional policy that only compensatory damages are permitted in private suits for secondary boycott violations. *Teamsters Local 20 v. Morton*, 377 U.S. 252, 260, n. 16 (1964).

Senator Taft's amendment was adopted[11] and was part of the bill as it was passed by the Senate. In the conference between the House and the Senate, the House receded on §12 of H.R. 3020 and accepted the Senate approach.[12] Compare, *e.g.*, (*N.L.R.B. v. Drivers' Local Union 639*), 362 U.S. 274, 285-290 (1960).

Thus, Congress determined to regulate union secondary activity, through the L.M.R.A. and to remedy (it) in part by allowing suits for compensatory damages, and to withhold the more drastic remedies of the antitrust laws.

The Landrum-Griffin Bill of 1959

We have seen that §§8(b)(4)(A) and 8(e) in the present statute were enacted in 1959 as a second step

[11] II Leg. Hist. 1947, 1400.
[12] I Leg. Hist. 1947, 562-563, 571.

in the Congressional regulation of union secondary activity through the LMRA. During the consideration of the 1959 amendments to that Act, Congressman Alger argued for antitrust regulation of such union activity:

> "Court decisions which removed labor organizations from antitrust laws were handed down in 1941 by the Supreme Court by United States against Hutcheson when the Court, in effect, said:
>
> 'If you are a labor union and you determine in your mind that what you desire to do — although unlawful to everybody else — is in the self-interest of your union, it becomes legal. No matter how much damage this activity may inflict upon the economy, society, or individuals, it is legal — because you say it is in the union's self-interest.'
>
> Then, in a 1945 decision, the Court opened the door still wider to union freedom from legal restraint. In simple terms, it said:
>
> 'Labor unions have a license to impose whatever economic restraints they wish * * * without regard to their effect upon the rest of society.' "

II Leg. Hist. 1959, 1570; see also id. at 1507.

In response Congressman Griffin advised the House, speaking on his own behalf and for Congressman Landrum "that if amendments are offered on the floor

to add antitrust provisions ... I, for one, will oppose them"; *id.* at 1572. Thereafter the House rejected on a voice vote an amendment which provided that nothing contained in the Labor Act or in the Norris-LaGuardia Act

> "shall be deemed to exempt from the application of the antitrust laws of the United States or of any state or territory thereof any employer, labor organization, or other person who becomes a party to or engages or participates in any such contract, combination or conspiracy in restraint of trade or commerce," id. at 1685.

Again, as in 1947, Congress chose amendment to the Labor Act as the sole vehicle for regulating union secondary activity, and rejected attempts to revive antitrust remedies for those activities.

In *Morton*[13] this Court determined the outer limits of Section 303, concluding that "the congressional judgment, reflected both in the language of the federal statute and in its legislative history, [demonstrate] that recovery for an employer's business losses caused by a union's peaceful secondary activities proscribed by Section 303 should be limited to actual, compensatory damages." 377 U.S. at 260. In the court's view Congress spoke with "great particularity" in describing the type of conduct to be made subject for a private damage action in Section 303 and in determining

[13] *Teamsters Local 20 v. Morton*, 377 U.S. 252 (1964).

"which forms of economic pressure should be prohibited by Section 303 Congress struck the 'balance between the uncontrolled power of management and labor to pursue their respective interests' ", id. U.S. at 258-9.

Against this backdrop, the Court of Appeals in this case properly concluded:

> "But nowhere has Congress ever said that a violation of the labor laws should give rise to treble antitrust damages, possible criminal punishments, and attorney's fees for the plaintiffs. Yet, allowing this suit to continue as an antitrust action merely because a violation of the labor laws was found would involve these punishments.'" 383 F.2d at 1170.

III. The Texas Anti-trust Laws Are Not Applicable To This Controversy.

As an alternative to its federal antitrust claim Connell invokes the Texas antitrust laws. Whether or not this controversy is within the primary jurisdiction of the National Labor Relations Board pursuant to the doctrine of *San Diego Building Trades v. Garmon*, 359 U.S. 236 (1959) as the Court below held,[14] it is without

[14] We, of course, agree with the court below that, notwithstanding the dissent in *Motor Coach Employees v. Lockridge*, 403 U.S. 274 (1970), the *Garmon* doctrine is "still the law of the land." However, given *Meat Cutters v. Jewel Tea*, 381 U.S. 676, 684-688 (1965) there is some question as to whether the *Garmon* doctrine is applicable here. Since the alternative doctrine of substantive suppersession (see e.g. *Teamsters Local 20 v.*

question placed beyond state control by Federal law. The case directly in point is *Teamsters Local 24 v. Oliver*, 358 U.S. 283 (1959) which petitioner, rather incredibly, cites in support of state jurisdiction. (Pet. Br. p. 46).[15]

In *Oliver* this Court reasoned:

> "We believe that there is no room in this scheme for the application here of this state policy limiting the solutions that the parties' agreement can provide to the problems of wages and working conditions. Cf. California v Taylor, 353 US 553, 566, 567. Since the federal law operates here, in an area where its authority is paramount, to leave the parties free, the inconsistent application of state law is necessarily outside the power of the State.

Morton, 377 U.S. 252 258-260 and *Beasley* v. *Food Fair Inc.*, ____ U.S. ____ 94 S.Ct. 2023 (1974) and, specifically, its application in *Teamsters Union* v. *Oliver*, 358 U.S. 283, plainly serves to oust state law, the relationship between *Garmon* and *Jewel Tea* in this area need not be resolved.

[15]Petitioner also cites *Giboney* v. *Empire Ice & Storage Co.*, 336 U.S. 490 (1949), a case which arose under the Missouri antitrust law (Pet. Br. p. 46). But as this Court said in *Weber* v. *Anheuser-Busch*, 348 U.S. 468 (1955), which arose under the same state statute:

> The Missouri Supreme Court relied upon Giboney v. Empire Storage & Ice Co., 336 US 490, for the proposition that a state court retains jurisdiction over this type of suit. But Giboney was concerned solely with whether the State's injunction against picketing violated the Fourteenth Amendment. No question of federal preemption was before the Court; accordingly, it was not dealt with in the opinion.

(348 U.S. at 481, n. 9)

> Hill v Florida, 325 US 538, 542-544, 89 L ed 1782, 1784-1786. Cf. International Union, etc., Workers v O'Brien, 339 US 454, 457; Amalgamated Asso. v Wisconsin Employment Relations Board, 340 US 383; Plankinton Packing Co. v Wisconsin Employment Relations Board, 338 US 953. The solution worked out by the parties was not one of a sort which Congress has indicated may be left to prohibition by the several States. Cf. Algoma Plywood & Veneer Co. v Wisconsin Employment Relations Board, 336 US 301, 307-312. Of course, the paramount force of the federal law remains even though it is expressed in the details of a contract federal law empowers the parties to make, rather than in terms in an enactment of Congress. See Railway Employes' Dept. A. F. of L. v Hanson, 351 US 225, 232. Clearly it is immaterial that the conflict is between federal labor law and the application of what the State characterizes as an antitrust law. ... Congress has sufficiently expressed its purpose to ... exclude state prohibition, even though that with which the federal law is concerned as a matter of labor relations be related by the State to the more inclusive area of restraint of trade. Weber v Anheuser-Busch, Inc., 348 US 468, 481."

358 U.S. at 296-297 (footnote omitted).

The foregoing conclusively disposes of petitioner's state law claim.[16]

CONCLUSION

We respectfully submit that the Court of Appeals decision be affirmed.

Respectfully submitted,

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ATTORNEY FOR
RESPONDENT

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing brief has been served upon opposing counsel of record by placing the same properly addressed in the United States Mail with adequate postage affixed thereto this ____ day of September, 1974.

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[16]Of course, even if the subcontracting agreement is not protected by the proviso to §8(e) the remedial scheme of federal law is exclusive. *Teamsters Local 20* v. *Morton*, 377 U.S. 252, 260-261.

APPENDIX

NATIONAL LABOR RELATIONS BOARD
OFFICE OF THE GENERAL COUNSEL

Washington, D.C. 20570 May 1, 1974

Re: Plumbers & Steamfitters, Local 100
(Hagler Construction Company)
Case No. 16-CC-447

William L. Keller, Esquire
Clark, West, Keller,
Sanders & Ginsberg
2424 First National Bank Bldg.
Dallas, Texas 75202

Dear Mr. Keller:

Your appeal in the above case has been carefully considered and is hereby denied.

The facts of the case show that the charged Union (Plumbers & Steamfitters, Local 100) picketed the Charging Party (Hagler Construction Company) for the purpose of forcing Hagler to sign a subcontracting agreement providing for all prospective on-site heating, air conditioning and duct work to be subcontracted only to employers having a collective-bargaining agreement with Local 100. At the time of the picketing, Hagler employed no employees engaged in heating and air conditioning work and there was no collective-bargaining relationship between Hagler and Local 100.

The issues arising from these facts are whether the above subcontractor agreement violates Section 8(e) of the Act, despite the construction industry proviso to 8(e), and whether Local 100's picketing to obtain the agreement thus violated Section 8(b)(4)(A) of the Act. An analysis of these issues and our conclusion is attached.

Very truly yours,
Peter G. Nash
General Counsel
/s/ ROBERT E. ALLEN
Robert E. Allen
Director, Office of Appeals

cc: Director, Region 16
Plumbers & Steamfitters, Local 100, 3629 West Miller Road, Garland, Texas 75041
Hagler Construction Co., 5327 North Central Expressway, Dallas, Texas 75205
David R. Richards, Esquire, 600 West 7th Street, Austin, Texas 78701

NATIONAL LABOR RELATIONS BOARD
OFFICE OF THE GENERAL COUNSEL
Washington, D.C. 20570

PICKETING TO OBTAIN 8(e) PROVISO AGREEMENTS IN CONSTRUCTION INDUSTRY

A number of cases have raised the issue of whether a construction union violates sections 8(b)(4)(A)

and/or 8(e) when it seeks or obtains by picketing an otherwise valid on-site construction subcontracting clause under the 8(e) proviso from a contractor who does not himself employ employees of the craft represented by that union.

The contentions of the Charging Parties as well as a number of arguments developed by the General Counsel's office itself, have been considered in detail as has been the recent decision of the Fifth Circuit Court of Appeals in the *Connell* case.[1] The General Counsel has concluded, for the reasons discussed fully below, that there is not sufficient basis to authorize complaint in these cases.

While not directly attacking the Board's holding in *Centlivre*,[2] it has been contended that an agreement entered into by or sought between the contractor and the union is not within the privilege of the construction industry proviso to Section 8(e), and that the union's conduct to obtain the agreement accordingly violated the Act, because the contractor did not employ employees of the craft represented by the union and had no collective-bargaining relationship with the union.[2A]

---

[1] *Connell Construction Company v. Plumbers & Steamfitters Local No. 100*, 5th Circuit, 72-1243, August 23, 1973.

[2] *Northeastern Indiana Building and Construction Trades Council, et al. (Centlivre Village Apartments)*, 148 NLRB 854, enforcement denied on other grounds, 352 F.2d 606 (C.A. D.C.).

[2A] Alternatively, it is argued that, although the agreement may be privileged under the 8(e) construction proviso, the absence of a collective-bargaining relationship between the contractor from whom the agreement is sought and the union seeking the agreement, renders economic action by the union violative of Section 8(b)(4)(A). However, the Board has made it clear

As the initial point of departure, the Board's decision in *Centlivre, supra,* which has been uniformly followed since its decision ten years ago, is now settled law for the General Counsel. The Board there accepted the view of all those Circuit Courts of Appeal which had passed on the issue[3] and had uniformly rejected the Board's prior view.[4] The Board in *Centlivre* held, as had the Courts, that a union's strike to *obtain* an agreement which would be privileged under the construction industry proviso did not violate Section 8(b)(4)(A).[5] The Board there stated:

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that picketing to obtain such a clause is not violative of Section 8(b)(4)(A), if the clause is within the construction proviso. (See e.g. fn. 19, *supra.*) Thus the basic issue remains whether the sought-after clause comes within the proviso.

[3] *Construction, Production & Maintenance Laborers Union, Local 383, et al.* v. *N.L.R.B. (Colson and Stevens Construction Co.),* 323 F.2d 422 (C.A. 9); *Essex County and Vicinity District Council of Carpenters and Millwrights, United Brotherhood of Carpenters, etc. (Associated Contractors of Essex County, Inc.)* v. *N.L.R.B.,* 332 F.2d 636 (C.A. 3); *Orange Belt District Council of Painters No. 48, AFL-CIO, et al. (Calhoun Drywall Co.)* v. *N.L.R.B.,* 328 F.2d 534 (C.A. D.C.). See also *Local Union No. 48 of Sheet Metal Workers* v. *Hardy Corp.,* 332 F.2d 682 (C.A. 5).

[4] The Board's prior view set out in *Colson and Stevens,* 137 NLRB 1650, was that only voluntary agreements were within the construction industry proviso to Section 8(e).

[5] Section 8(b)(4)(A) of the Act, as amended by the Landrum-Griffin Act of 1959, makes it an unfair labor practice for a union to induce employees to strike or to threaten, coerce or restrain any person where an object is:

> (A) forcing or requiring any employer . . . to enter into any agreement which is prohibited by Section 8(e).

Section 8(b)(4)(B) could nevertheless, as in *Centlivre* itself, be violated if the union's conduct sought the breaking of an existing business relationship at the site of construction, i.e., had an immediate cease doing business object.

Subsequent to the issuance of *Colson and Stevens,* however, United States Courts of Appeals for three separate circuits have considered and uniformly rejected the above analysis and conclusion. In essence these cases hold that the Board failed to give sufficient scope to the construction industry proviso to 8(e).

In view of the *Centlivre* holding, the Section 8(b)(4)(A) and Section 8(e) issues of the instant cases turn on whether the agreement entered into or sought between the contractor and the union would violate Section 8(e) for the reasons urged by the Charging Parties.

Section 8(e) provides in pertinent part:

> "It shall be an unfair labor practice for any labor organization and any employer to enter into any contract or agreement, express or implied, whereby such employer ceases or refrains or agrees to cease or refrain from handling, using, selling, transporting or otherwise dealing in any of the products of any other employer, or to cease doing business with any other person, and any contract or agreement entered into heretofore or hereafter containing such an agreement shall be to such extent unenforceable and void: *Provided,* That nothing in this subsection (e) shall apply to an agreement between a labor organization and an employer in the construction industry relating to the contracting or subcontracting of work to be done at the site of the construction, altera-

> tion, painting or repair of a building, structure, or other work . . . ."

Since the Union here is a "labor organization" and the contractor "an employer in the construction industry," and since their agreement is confined to the work to be done at the site of construction, the agreement clearly comes within the language of the proviso to Section 8(e). Left then are the contentions of the Charging Parties that there are two alternative implicit preconditions to the validity of an agreement otherwise within the construction industry exemption: (1) that there be an existing collective-bargaining relationship between the parties to the agreement; or (2) that the employer party employ employees doing the kind of work covered or to be covered by the agreement. These contentions are now considered.

While recognizing that a proviso to a general statutory prohibition is to be narrowly construed, the contentions of the Charging Parties cannot be considered on mere axioms of interpretation since the purpose and scope of the construction industry proviso has been the subject of substantial Board and Court litigation in the almost 15 years since its enactment.

The issues here raised involve, of course, a *"secondary"* agreement to be applied to work at a site of construction and not a primary agreement.[6] That a pri-

[6]The distinction from cases involving "primary" objects such as union recognition sought through direct (picketing) pressure on an employer is set out in the Court's decision in *Dallas*

mary agreement would be wholly outside the ambit of Section 8(e) is made clear by the Supreme Court in *National Woodwork Manufacturer's Assn.* v. *N.L.R.B.*, 386 U.S. 612, where the Court, in discussing the proviso to Section 8(e) in relation to the "central theme" of the Section, stated:

> "However, provisos were added to § 8(e) to preserve the *status quo* in the construction industry, and exempt the garment industry from the prohibitions of §§ 8(e) and 8(b)(4)(B). This action of the Congress is a strong confirmation that Congress meant that both §§ 8(e) and 8(b)(4)(B) reach only secondary pressures. If the body of § 8(e) applies only to secondary activity, the garment industry proviso is a justifiable exception which allows what the legislative history shows it was designed to allow, secondary pressures to count-

Building Trades Council v. *N.L.R.B.*, 396 F.2d 677, 682 (C.A. D.C.):

> The Board's responses to these arguments are, however, convincing. First, there is no inconsistency between the Board's interpretation of Section 8(b)(7) and the purposes of Section 8(e). It simply does not follow from the fact that the agreement would be lawful if voluntarily adopted that a labor organization can employ illegal means to obtain it. *Section 8(b)(7) and 8(e) are aimed at wholly different problems.* And the proscriptions of Section 8(b)(7) do not vary with the legality of the agreement sought. Picketing to obtain a wage agreement, for example, is no more lawful than picketing to obtain a hot cargo clause. (Emphasis supplied.)

See also *Building and Construction Trades Council of Philadelphia and Vicinity (Samuel E. Long, Inc.)*, 201 NLRB No. 42, 1973, enfd. 485 F.2d 680 (C.A. 3, 1973).

eract the effects of sweatshop conditions in an industry with a highly integrated process of production between jobbers, manufacturers, contractors and subcontractors. First, this motivation for the proviso sheds light on the central theme of the body of § 8(e), from which the proviso is an exception. Second, if the body of that provision and § 8(b)(4)(B) were construed to prohibit primary agreements and their maintenance, such as those concerning work preservation, the proviso would have the highly unlikely effect, unjustified in any of the statute's history, of permitting garment workers, but garment workers only, to preserve their jobs against subcontracting or prefabrication by such agreements and by strikes and boycotts to enforce them. Similarly, the construction industry proviso, which permits 'hot cargo' agreements only for jobsite work, would have the curious and unsupported result of allowing the construction worker to make agreements preserving his traditional tasks against jobsite prefabrication and subcontracting, but not against nonjobsite prefabrication and subcontracting. On the other hand, if the heart of § 8(e) is construed to be directed only to secondary activities, the construction proviso becomes, as it was intended to be, a measure designed to allow agreements pertaining to certain secondary activities on the construction site because of the close community of interests there,[32] but to ban secondary-objective agreements concerning nonjobsite work, in which respect the construction industry is no different from any other. The provisos are therefore substantial probative support that primary work preservation agreements were not to be within the ban of § 8(e)." (At 637-639)

"[32]See *Essex County and Vicinity Dist. Council of Carpenters* v. *Labor Board*, 332 F.2d 636 (C.A. 3d Cir. 1964); Comment, The Impact of the Taft-Hartley Act on the Building and Construction Industry, 60 Yale L.J. 673, 684-689 (1951)."

The Court's statement has, of course, pointed significance concerning both the legislative purpose underlying the construction industry proviso and the contentions of the Charging Parties here. Thus the Court, as noted above, stated that the proviso was:

> ". . . intended to be, a measure designed to allow agreements pertaining to certain secondary activities on the construction site because of the close community of interests there,[32] but to ban any secondary objective agreements concerning non-jobsite work, in which respect the construction industry is no different from any other."

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[32]*Supra.*

The Court's citation at footnote 32 to the Third Circuit's decision, *Essex County*, *supra*, amplifies the

meaning of "close community of interests" at the construction site,[7] which underlies the exemption.

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[7]The Court's citation of the Yale Law Journal Comment is equally significant. That Comment, published shortly before the Supreme Court's decision in *Denver Building*, expressed, at the pages cited, disagreement with the Board's finding of violation in the case because of the relationships at a construction site. On page 689 of the Comment this view is set forth as follows:

> "The general contractor in the construction industry is in a significantly different position. Unlike B, in the example above, the general contractor's own labor policies are the reason his place of work is being picketed. For he has brought onto the job a non-union subcontractor. This, as Judge Clark pointed out in his dissent in the *Electrical Workers* case, is immediate cause of the dispute. For purposes of 8(b)(4)(A) all the men working on the job should be considered the general contractor's employees; he should not be allowed to insulate himself from the effects of having non-union men work side by side with union men simply because the custom and structure of the industry places a subcontractor between him and direct employment of the non-union men. In other words, the test should be whether the direct employer of the non-union men (the subcontractor) is sufficiently closely connected both geographically and economically with the direct employer (the general contractor) so that the labor policies of the one may be attributed to the other. The contractor-subcontractor relationship in the construction industry should be held to satisfy this test.
>
> The general contractor, however, should be regarded as the employer of a subcontractor's employees only for purposes of that job where the two contractors are working together. Therefore, although a construction union trying to organize any subcontractor on a project should have the right to picket the entire project, it should not be permitted to extend its activity to other sites on which the picketing is to organize a particular job, the geographical boundaries of that job should mark the confines of the dispute.

The Third Circuit had explained it as follows:

> This limited exemption was granted apparently in recognition of problems peculiar to the construction industry, particularly those resulting from sporadic work stoppages occasioned by the traditional refusal of craft unionists to work alongside non-union men on the same project. (At p. 640.)

This view of the proviso's purpose is also set forth in *Drivers Local 695* v. *N.L.R.B.*,[8] where the Circuit Court, in pertiment part, stated:

> "The purpose of the Section 8(e) proviso was to alleviate the friction that may arise when union men work continuously alongside non-union men on the same construction site.[22]"

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[22]See *Essex County & Vic. District Council of Carpenters, etc.* v. *N.L.R.B.*, 332 F.2d 636, 640 (3rd Cir. 1964); *N.L.R.B.* v. *Denver Bldg. & Const. Trades Council*, 341 U.S. 675, 692, 71 S. Ct. 943, 95 L. Ed. 1284 (1951) (Douglas J. dissenting); Comment, *Hot Cargo Agreements Umder the National Labor Relations Act: An Analysis of Section 8(e)*, 38 N.Y.U.L. Rev. 97, 111 (1963); Comment 45 CORNELL L.Q. 724, 753 (1960).

And the dissent[9] in *Denver Building*, referred to in *Drivers Local 695*, stated:

> "The employment of union and nonunion men on the same job is a basic protest in trade un-

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[8]361 F.2d 547, 551 (C.A. D.C., 1966).

[9]Justices Douglas and Reed.

ion history. That was the protest here. The union was not out to destroy the contractor because of his antiunion attitude. The union was not pursuing the contractor to other jobs. All the union asked was that union men not be compelled to work alongside nonunion men on the same job. As Judge Rifkind stated in an analogous case, 'the union was not extending its activity to a front remote from the immediate dispute but to one intimately and indeed inextricably united to it."[1]

"The picketing would undoubtedly have been legal if there had been no subcontractor involved — if the general contractor had put nonunion men on the job. The presence of a subcontractor does not alter one whit the realities of the situation; the protest of the union is precisely the same. In each the union was trying to protect the job on which union men were employed. If that is forbidden, the Taft-Hartley Act makes the right to strike, guaranteed by § 13, dependent on fortuitous business arrangements that have no significance so far as the evils of the secondary boycott are concerned. I would give scope to both § 8(b)(4) and § 13 by reading the restrictions of § 8(b)(4) to reach the case where an indus-

[1]*Douds* v. *Metropolitan Federation*, 75 F. Supp. 672, 677.

trial dispute spreads from the job to another front.[2]

[2]See the opinion of Judge Fahy below, 87 U.S. App. D.C. 293, 186 F.2d 326; and the dissenting opinion of Judge Clark, *International Brotherhood* v. *N.L.R.B.*, 181 F.2d 34, 40.

It seems clear from the foregoing, even before proceeding to consideration of the relevant Board decisions from *Centlivre* to the present, that the construction industry proviso has been recognized as privileging what may be characterized as "Denver Building Agreements" confined to the site of construction. That is, while the Supreme Court decision in *Denver Building* was not overruled,[10] *agreements* covering *Denver Building* relationships at a construction site were exempted from the prohibition of Section 8(e).[11]

[10]That *Denver Building* was not "overruled" by the Supreme Court's decisions in *General Electric*, 366 U.S. 667, and *Carrier*, 376 U.S. 492, is fully set forth in the Board's decision in *Markwell and Hartz*, 155 NLRB 319, enfd. 387 F.2d 79 (C.A. 5); see also 383 F.2d 562 (C.A. 6). *Markwell and Hartz*, however, gives no support to the contentions of the Charging Party concerning construction industry on-site *agreements*.

[11]*Denver Building* itself points away from the Charging Parties' contentions. Thus it appears that the neutral general contractor there, Doose and Lintner, did not employ electricians but, rather, subcontracted electrical work to the primary nonunion electrical contractor, Gould and Preisner. Indeed the Supreme Court, in rejecting the Union's contention that it had a primary dispute with Doose and Lintner in seeking to force Doose and Lintner to make the project an all-union job, pointed out that "If, for example, Doose and Lintner had been doing all the electrical work on this project through its own nonunion employees, it could have replaced them with union men and thus dispose of the dispute." (At p. 688.)

In sum then, since the constructior industry provise deals with "secondary" agreements, the "community of interest" involved is not tied to concepts of "unit work preservation" but rather to interests of those doing work (or business) at the jobsite. And based on this interest Congress permitted agreements there which, being "secondary" would otherwise and elsewhere be prohibited.

The legislative history supports this view. As pointed out by the Board in *Centlivre* at footnote 17:

> "The intent of Congress to retain the then existing law in connection with secondary boycotts in the construction industry is apparent from the following statement by the House conferees:
>
> "*The committee of conference does not intend that this proviso should be construed so as to change the present state of the law with respect to the validity of this specific type of agreement relating to work to be done at the site of the construction project,* or to remove the limitations which the present law imposes with respect to such agreements. Picketing to enforce such contracts would be illegal under the *Sand Door* case *(Local 1976, United Brotherhood of Carpenters [and Joiners of America, AFL, et al. (Sand Door & Plywood Co.)]* v. *N.L.R.B.*, 357 U.S. 93 (1958)). *To the extent that such agreements are legal today under Section 8(b)(4) of the National Labor Relations Act, as amended, the proviso would prevent such legality from being affected by Section 8(e). The proviso applies only to Section 8(e)* and therefore leaves unaffected the law developed under Section 8(b)(4). The *Denver Building Trades* case and the *Moore Drydock* cases would remain in full force and effect. The proviso is not intended to limit, change, or modify the present state of the law with respect to picketing at the site of a construction project. Restrictions and limitations imposed upon such picketing under present law as interpreted, for example, in the U.S. Supreme Court decision in the *Denver Building Trades* case would remain in full force and effect .... House Conference Report on Labor-Management Reporting and Disclosure Act of 1959, House Report 1147, 86th Cong., 1st sessions, pp. 39-40." [Emphasis supplied with respect to portions bearing on "agreements."]

This is supported further by the statements of Senators Kennedy and Goldwater in the legislative history. Senator Kennedy explained the 1959 amendments as follows:

> "*The first proviso under new section 8(e) of that National Labor Relations Act is intended to preserve the present state of the law* with

respect to picketing at the site of a construction project and *with respect to the validity of agreements relating to the contracting of work to be done at the site of a construction project.*

"*This proviso affects only section 8(e)* and therefore leaves unaffected the law developed under section 8(b) (4). The Denver Building Trades (341 U.S. 675) and the Moore Drydock (92 N.L.R.B. 547) cases would remain in force.

"*Agreements by which a contractor in the construction industry promises not to subcontract work on a construction site to a nonunion contractor appear to be legal today. They will not be unlawful under section 8(e). The proviso is also applicable to all other agreements involving undertakings not to do work on a construction project site with other contractors or subcontractors regardless of the precise relation between them.*[12] Since the proviso does not relate to section 8(b)(4), strikes and picketing to enforce the contracts excepted by the proviso will continue to be illegal under section 8(b)(4) whenever the Sand Door case (357 U.S. 93) is applicable.

"It is not intended to change the law with respect to the judicial enforcement of these contracts, or with respect to the legality of a strike to obtain such a contract.

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[12]Relied on by the Board in *Carpet*, 152 NLRB 1672, discussed below.

"It should be particularly noted that *the proviso relates only to 'contracting or subcontracting of work to be done at the site of the construction.'* The proviso does not cover boycotts of goods manufactured in an industrial plant for installation at the jobsite, or suppliers who do not work at the jobsite. [II Leg. Hist. Act of 1959, 1433(3).]"
(Emphasis supplied.)

And Senator Goldwater stated:

"*There is a further exemption from the prohibitions against 'hot cargo' agreements only, under section 8(e), with respect to a segment of the building construction industry and the labor unions representing employees in that segment of the industry. This exemption is granted only where the employer with whom such an agreement is signed is in the construction industry and engages only in construction work at the site;* it does not apply where the employer, although in the construction industry, is not engaged in construction work at the site such as enterprises primarily engaged in supplying or transporting building construction materials. *Where an employer falls into this limited category, it is not an unfair labor practice for such employer and a labor union to enter into an agreement* whereby such employer ceases or refrains or agrees to cease or refrain from handling, using, selling, trans-

porting or otherwise dealing in any of the products of another employer, or to cease doing business with any other person, and *such an agreement is not per se unlawful.* Unlike the exemption for the apparel and clothing industry, the prohibitions of the secondary boycott ban in section 8(b)(4), as amended, are however, applicable to these situations.

"Thus, although *employers and unions who are under this exemption may lawfully enter into such agreements,* and may resort to the courts for their enforcement under applicable principles of contract law, no coercion or restraint — economic or otherwise — may be used by any party to such an agreement, even if entered into voluntarily by both parties, to compel the other party to live up to the contract or to refrain from breaching it." [II Leg. Hist. (1959) 1858(1)]
(Emphasis supplied.)

Turning now to consideration of relevant Board law from *Centlivre* to the present, the Board decisions provide no support, but rather undercut, the contentions of the Charging Parties.[13] In *Centlivre* itself, the Board, in accepting the view of the Circuit Courts which had

[13]*Building Material & Construction Teamsters Union Local No. 216 (Bigge Drayage Co.)*, 198 NLRB No. 130, and *General Teamsters Local 386 (Construction Materials Trucking, Inc.)*, 198 NLRB No. 129, cited on appeal for the proposition that such agreements are secondary in nature and therefore illegal, are not in point because they do not relate to on-site work.

"uniformly rejected" the prior Board view, stated: "in essence these [Court] cases hold that the Board failed to give sufficient scope to the construction proviso to Section 8(e)." The Board then treated the clauses there involved as within the construction industry proviso to Section 8(e).[14] And the facts of *Centlivre* run contrary to the contentions of the Charging Party here. The Respondent Unions there included a Construction Trades Council and affiliated locals, including Painters, Laborers, Carpenters, Plumbers, Sheet Metal Workers, Iron Workers, and Electrical Workers. Also Respondent was a Bricklayers Local. The Respondent Unions sought from Centlivre, a general contractor, the "secondary" clauses set forth on p. 861 of the Board decision. These agreements would have required of Centlivre that only signatories to a contract with Respondent Unions would be permitted to work on the construction site.[15] As set out in the Trial Examiner's decision:[16]

[14]The Board in footnote 11 of its decision stated:

> "Neither the General Counsel nor the Charging Party disputes the proviso's application to the clauses in question. Accordingly, there being no issue before us as to the validity of such clauses, we assume, for purposes of this case, that they are within the proviso and lawful.

There is no indication, however, that this reservation had any relationship to the factors argued for by the Charging Party in the instant case. (See discussion of *Colson and Stevens* below.) Rather, it appears that the reservation is related to "self-help" issues decided shortly thereafter by the Board in *Muskegon*, 152 NLRB 360, since the clauses in *Centlivre* did contain "self-help" provisions. See *Centlivre, supra*, at p. 861.

[15]Supra, p. 856 and fn. 13.

[16]Supra, p. 859

> "As general contractor, Centlivre itself employed 6 to 9 laborers, carpenters, and cement finishers. It subcontracted particular craft operations to various firms in the Ft. Wayne area."

Centlivre had no collective-bargaining contract or relationship with the Respondent Unions. And since Centlivre employed only laborers, carpenters and cement finishers, the subcontracting agreement restrictions would have applied to work of a kind Centlivre's own employees did not perform. Thus it is entirely clear that the elements contended for by the Charging Parties in the instant cases as determinative for the validity of an on-site agreement under the construction industry proviso were absent in *Centlivre* and the Board, nevertheless, treated the clauses as within the construction industry proviso.

Significant too is the fact that in *Colson and Stevens* itself, (where the facts were very like those in the instant case) the factors the Charging Parties here contend to be preconditions to proviso validity did not exist That is, Colson had no collective-bargaining agreement or relationship with the Unions there involved and the subcontracting agreement sought covered work which employees of Colson did not perform. Thus the Unions there (Carpenters and Laborers) sought to compel Colson to grant recognition covering carpenters whom he did employ. But the Unions also sought an agreement with secondary subcontracting restrictions concerning any work Colson subcontracted and

not confined to carpentry work.[17] The Board, based on its pre-*Centlivre* view that only *voluntary* agreements were within the construction industry proviso to Section 8(e), found a violation on that basis. There is no scintilla of suggestion in the Board's decision that, had the subcontracting agreement sought by the Unions been "voluntarily" entered into, the Board might nevertheless have viewed the agreement as outside the construction industry proviso. So the underlying relevant facts of *Colson and Stevens*, just as in *Centlivre*, are at odds with the contentions of the Charging Parties here.

The Board's holding in *Church's Fried Chicken*, 183 NLRB No. 102, on the facts there, is also directly contrary to the contentions of the Charging Parties. While finding a violation of Section 8(b)(7)(C) of the Act, the Board, upon exceptions filed, affirmed the dismissal of the 8(b)(4)(A) and (B) allegations of the complaint. This was based on the Trial Examiner's full discussion of the Section 8(b)(4) issues. Thus the Trial Examiner pointed out that a violation of Section 8(b)(4)(A) would require a finding that the Union was attempting to have Church sign an agreement violative of Section 8(e). And this entailed a determination whether Church was "an employer in the construction industry." Upon concluding, after discussion of the legislative history, that Church was such an employer, the Trial Examiner found that the agreement which the Union sought would not have been violative of Section 8(e) because of the construction industry proviso,

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[17] See *Colson*, *supra*, at p. 1650 and 1651, and fn. 1.

and in consequence, no violation of 8(b)(4)(A) could be found. As pointed out by the Trial Examiner "Church, instead of employing a general contractor, acted as its own prime contractor through ... its construction superintendent." It is clear that Church had no collective-bargaining agreement or collective-bargaining relationship with the Respondent Building Trades Council, nor did Church directly employ employees of the crafts which might be represented by affiliates of the Respondent Building Trades Council.[18] The holding in *Church's Fried Chicken* then also negates the Charging Party's contention.

The Board's post-*Centlivre* decisions giving broad scope to the proviso also militate against the Charging Parties arguments. Thus in *Muskegon*, 152 NLRB 360, the Board considered the validity under Section 8(e) of the following clause:

> "It is agreed that the members of Bricklayers Local Union No. 5 may refuse to work on any job where *any of the work, irrespective of craft*, is performed, has been performed, or is to be performed by craftsmen who enjoy less favorable *wages and working conditions* than is provided in the *current collective-bargaining agreement between the equivalent* Muskegon County Building Trades *Local Union and its contracting employers*. Such refusal shall not be grounds for discharge or other disciplinary

[18]With the possible exception of a laborer. See p. 3 of Trial Examiner's Decision.

> action, but shall be regarded as a failure of the employer to provide suitable work." (Emphasis supplied.)

As emphasized in the Board decision itself, the clause permitted a strike by members of the Bricklayers Union where *any of the work, irrespective of craft*, is, has, or is to be performed by craftsmen who enjoy less favorable wages and working conditions than is provided in the current collective-bargaining agreement *between the equivalent Building Trades Union and its contracting employers*. The Board, in a detailed discussion, held the clause to be within the ambit of Section 8(e) and beyond the construction industry exemption solely because of the self-help feature which the clause contained.[19]

Thus the agreement between the Bricklayers and Muskegon, apart from its "self-help" features, was viewed as valid under the proviso, though it was applicable "irrespective of craft" and was conditioned on the "wages and working conditions ... in the collective bargaining agreement between the equivalent ... Local Union and its contracting employers."

[19]This is made clear in the decision itself and, particularly footnote 13, where the Board rejected the General Counsel's contention based on *Colson and Stevens*, 137 NLRB 1650. The Board, citing *Centlivre*, noted that it had:

> "recently reversed *Colson and Stevens* and now holds that picketing to obtain a contract clause which is within the construction industry proviso to Section 8(e) does not violate Section 8(b)(4)(A).

Then in *Carvel*, 152 NLRB 1672, the Board considered the validity of the following clause:

> "The Employer [Carvel] agrees that no journeyman or apprentice who is a member of Local 217 ... will be assigned to work or expected to work or required to work, on any job or project *on which a worker or person, is performing any work within the jurisdiction of Local No. 217*, if said worker or person is performing such work for wages, hours or under any *conditions* of employment, which are different from those established by this agreement." (Emphasis supplied.)

While again finding, as in *Muskegon*, that the clause was unprivileged because of its "self enforcement provisions", the Board clearly viewed the clause as otherwise within the construction industry exemption. The Board specifically rejected the contention there made that the proviso was inapplicable because the contract provision did not refer to the "contracting out" or "subcontracting" of unit work and affected persons and employers with whom Carvel had no contractual relationship.[20] The Board stated:

> "... the application of the proviso does not, in our view, depend on the precise relationship between Carvel with whom the Union has a contract and other employers and persons on the job, in this instance the general contractor

[20] At p. 1677 and fn. 8.

> and Ballard, who may be affected by the enforcement of the contractual proviso. The language of the proviso itself does not limit its applicability to the 'contracting out' or 'subcontracting' of work by the employer with whom a union has an agreement within the scope of Section 8(e). Indeed, were the proviso given such a limited applicability, it would be of little effect, for aside from the general contractor on a job, the various firms involved normally have control only of 'unit' work — that is, the particular work for which they hold a subcontract. Restrictions on the right to subcontract such work could well be primary, and thus lawful without reference to the construction industry proviso, because they are wholly outside the scope of 8(e)." (At p. 1676.)

The Board decision in *Ets-Hokin*, 154 NLRB 839, followed as recently as *Baltimore Contractors*, 190 NLRB 415, also reflect the breadth given to the construction industry proviso except where "self-help" provisions are included in the agreement. In *Ets-Hokin*, the clause at issue provided:

> "The Local Unions are part of the International Brotherhood of Electrical Workers and any violation or annulment of working rules or agreements of *any other Local Union of the IBEW*, or the subletting, assigning, or transfer of any work in connection with electrical work to any person, firm, or corporation not recognizing the IBEW as the collective-bargaining

> representative *on any electrical work in the jurisdiction of this or any other such Local Union by the Employer*, will be sufficient cause for the cancellation of this agreement, after the facts have been determined by the International Office of the Union.

The Board in *Ets-Hokin* and in subsequent cases collected in *Baltimore Contractors, supra*, treated such a clause as within the construction industry proviso.

Thus, the Board decisions since *Centlivre* have either held or viewed the construction industry proviso as privileging what may be characterized as *Denver Building* on-site agreements despite the absence of the factors which the Charging Parties here contend are required conditions of proviso exemption, where the facts were not at odds with those of the Charging Parties' cases. And the full scope given to the proviso in such decisions points directly away from the Charging Parties' contentions.

And if, as the Board has held in cases discussed above, the exemption applies where the "agreeing" employer has no employees of the kind or craft involved,[20A]

[20A] As a matter of fact the Board has held, with court approval, that a "person" can violate 8(e) by entering into a proscribed agreement with a labor organization *International Association of Machinists & Aerospace Workers, AFL-CIO (Lufthansa German Airlines)*, 197 NLRB No. 18, enfd. 85 LRRM 2257 (C.A. 9 January 9, 1974). Thus, if a person who employs no one can violate 8(e) it would be axiomatic that such a person could enter into a privileged 8(e) proviso agreement absent a showing that Congress intended the proviso to be narrower in coverage than the prohibition to which it is an exception.

there is no reason to attach significance to whether the agreement is in a "collective-bargaining contract" or whether there is a "collective-bargaining relationship" between the union and employer (for instance, the general contractor) party to the agreement. Since any such "collective bargaining contract" would not fix general terms and conditions of employment for any of the employer's own employees, no independent significance appears with respect to this contention of the Charging Parties.

The Court decision in *Connell, supra*, involving issues under the anti-trust laws, has also been carefully and fully considered in light of the foregoing discussion based on cases arising under the Act itself. With the fullest respect to the Court, we see no basis for relying on the dictum of the majority view and the discussion in the minority opinion of *Connell* which would warrant rejection of the foregoing discussion and analysis. Thus the Court in *Connell* was apparently of the view that the absence of a "collective bargaining relationship" would preclude a finding that the construction industry exemption to Section 8(e) might operate. And the Court apparently believed that this question has not been considered by the Board and Courts.

But these arguments[21] (the absence of a representable

[21] The Charging Parties here argue that the fundamental representation concepts and policies reflected in Section 9(a) and 8(b)(7), when read in conjunction with the exception expressly created in 8(f), are undermined by permitting picketing for subcontracting agreements of employers who do not employ workers in the craft represented by such unions. See footnote 6 above and the discussion below concerning the "equities" position in the dissenting opinion of *Connell*.

class of employees and its variant — the absence of a collective-bargaining relationship) are essentially indistinguishable from those rejected by the Board and Courts in the past. Thus, in addition to the above discussion, it should be noted that the absence of an employment relationship theory was directly before the Court in *San Bernadino*.[22] There, in supporting its argument that the agreement sought had an unlawful secondary effect, the Board offered the following analysis:

> "In the context presented in this case, where the subcontractor clause is sought to be imposed upon a general contractor for whom subcontracting is the normal mode of carrying on his enterprise ... the terms of Article I-F and its uniform interpretation by the Union show [that] the clause amounts to a commitment by the signatory employer to use only AFL-CIO subcontractors, and, accordingly, to boycott another employer for reasons not strictly germane to the economic integrity of the principal work unit.
>
> "Indeed, Article I-F limits the category of permitted subcontractors *even in those crafts which, by hypothesis, the signatory employer does not himself employ*. The record contains no evidence as to the number of [the prime contractor's] employees, if any, nor as to their

[22] ***Building and Construction Trades Council of San Bernadino and Riverside Counties, et al. v. N.L.R.B., 328 F.2d 540 (D.C. C.A., 1964).***

> craft or trade. But it is improbable that ... a small contractor, actually hires members of the entire range of trades represented in home construction; even the largest general contractors tend to employ only persons in the basic trades, subcontracting the specialty work. Article I-F, however, makes no distinction according to whether or not a subcontractor could be 'competing' with the signatory employer's own employees. Thereby it reveals its purpose to cause a boycott of 'nonunion' (i.e., non-AFL-CIO) subcontractors."
>
> (Board brief in *San Bernadino*, pp. 41, 42, citations omitted. Emphasis supplied.)

The D. C. Circuit Court was not persuaded, rejecting, *sub silento*, the absence of a "collective-bargaining relationship" between the picketing Council and picketed employer as a basis for finding subcontracting agreements unprotected by the building and construction proviso to 8(e).

And in *Colson and Stevens*,[23] in the Ninth Circuit Court of Appeals, the Board relied upon the context of requirements under Section 8(b)(3) and 8(d) of the Act. Thus, in describing the "secondary subcontractor clause" in issue, the Board briefly characterized it as a "regulation of third party relationship extrinsic to

[23] ***Construction Production & Maintenance Laborers Union, Local 383, AFL-CIO and United Brotherhood of Carpenters and Joiners of America, Local 1089, AFL-CIO v. N.L.R.B., (Colson and Stevens Construction Co.), 323 F.2d 422 (C.A. 9, 1963).***

the employment relationship" and therefore as involving a non-mandatory bargaining subject which the unions could not strike to obtain (Board's brief at p. 26).

With respect to the dissenting opinion in *Connell*, Judge Clark presented two approaches to the Section 8(e) on-site proviso, one based on equitable considerations and the other based on his view of the legislative history.

The legislative history of the construction industry proviso and its interpretation in cases arising under the Act is dealt with at length earlier. It is not repeated here. As for the dissenting Judge's views concerning "one shot" agreements and the pattern of bargaining in the construction industry prior to enactment of the 1959 amendments to the Act, the Board's brief in *Colson and Stevens*, supra, is enlightening. There, in discussing the construction industry practice legitimized by the proviso, the brief states:

> "As was pointed out in a 1950 study of building trades bargaining in the 12 counties of southern California, where a master agreement establishing basic employment standards has been in effect since 1941 in which 19 building trades unions participate together with the 10 building trades councils and the major contractors' associations, 'for the well-established employers, it is also important to have a floor under competitive labor costs.' The structure of the industry, with subcontracting a customary way of doing business, leads employers to favor subcontracting clauses as a means of under-

> girding such a 'floor.' The Southern California master labor agreement referred to above contains such a clause, similar to the clause that the petitioner Unions sought to force upon Colson, as a result of which 'any subcontractor [of a signatory contractor] who attempts to depart from the established union standards' faces cancellation of his contracts and an immediate loss of business.' On the other hand, if the contractor is unwilling in [these] circumstances to cancel the contract, or if he lets a subcontract to one who refuses to become bound by the master labor agreement, then the signatory contractor faces suit by the unions for specific performances with an interruption of work on his project occasioned by a change of subcontractors, and perhaps a damage suit by the ousted subcontractor. The bargaining pattern, with these effects, Congress believed legitimate and left lawful ...." (Board's *Colson and Stevens* brief, pp. 19-21.)

This is particularly significant when it is realized that organizing in the building and construction industry both prior to and subsequent to the 1959 amendments, was and is primarily carried on by building and construction trades councils on behalf of their constituent craft locals. The building trades agreements proffered are not conventional collective-bargaining agreements, nor is a conventional collective-bargaining relationship sought, but rather an attempt is made to

obtain skeleton agreements[24] (containing little more than subcontracting provisions) which in turn are augmented by the execution of collective-bargaining agreements by the individual trade unions, the latter agreements containing provisions governing wages and other substantive conditions of employment. As the Court observed in *Dallas Building and Construction Trades Council* v. *N.L.R.B.*, 396 F. 2d 677 (C.A. D.C.), at p. 682:

> ". . Congress intended by means of Section 8(e) to preserve the status quo of bargaining in the construction industry; and in 1959 'umbrella' agreements like the one proposed here were, as they are today, commonplace, for collective-bargaining is traditionally conducted at several levels in the construction industry . . . ."

Under this arrangement the building and trades council is as much as a "stranger" to the general contractor and his employees, if any, as the Plumbers Union was to Connell. The subcontracting clause encased in such a trades council "shell" agreement can no more be said to be obtained in the context of a collective-bargaining relationship than the proviso agreement sought or obtained in such cases as *Colsor and Stevens, supra, Centlivre, supra,* and *Church's Fried Chicken, supra.*

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[24]The text of a typical building and construction trades council agreement is set forth in detail in *Dallas Building and Construction Trades Council*, 164 NLRB 938, fn. 2 at p. 940.

As for the "equities" raised in the dissenting opinion, they have been substantially dealt with by the Board and Courts in cases under Section 8(b)(7) of the Act. Thus, the Board and Court in *Dallas General, supra,* have pointed out the absence of any inconsistency between the Board's interpretation of Section 8(b)(4) and the purposes of Section 8(e). The Court in *Dallas General* pointed out that "Sections 8(b)(7) and 8(e) are aimed at wholly different problems." Thus, the cases make clear that while considerations involving Section 9(a) selection of a bargaining representative may be directly related to Section 8(b)(7) of the Act,[25] such considerations are unrelated to "secondary" agreement issues under Section 8(e).

In view of all the foregoing, including Supreme Court and Circuit Court decisions, relevant legislative history and the Board's post-*Centlivre* decision, we find the contentions of the Charging Parties to provide no basis to establish under current Board law, violations of either Section 8(e) or 8(b)(4)(A) of the Act.

/s/ PETER G. NASH
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[25]See, e.g., in addition to *Dallas General, supra, Lane-Coos-Curry-Douglas Counties Building and Construction Trades Council, AFL-CIO*, 168 NLRB 538, enf. 415 F.2d 656 (C.A. 9); *Los Angeles Building and Construction Trades Council, et al., (Lively Construction Co.)*, 170 NLRB 1499; *Church's Fried Chicken, supra;* and *Construction Trades Council of Philadelphia and Vicinity (Samuel E. Long, Inc.)*, 201 NLRB No. 42, enfd. 485 F.2d 680 (C.A. 3, 1973).

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No. 73-1256

Supreme Court of the United States

OCTOBER TERM, 1974.

CONNELL CONSTRUCTION COMPANY, INC.,
Petitioner,

v.

PLUMBERS AND STEAMFITTERS LOCAL UNION NO. 100 OF UNITED ASSOCIATION OF JOURNEYMEN AND APPRENTICES OF THE PLUMBING AND PIPEFITTING INDUSTRY OF THE UNITED STATES AND CANADA, AFL-CIO,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

BRIEF FOR THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AS AMICUS CURIAE

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BRIEF FOR THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AS AMICUS CURIAE

This brief *amicus curiae*, in support of the position of the respondent, is filed by the American Federation of Labor and Congress of Industrial Organizations (AFL-CIO), a federation of 111 national and international labor unions having a total membership of approximately 14,000,000 working men and women, with the consent of the parties, as provided for in Rule 42 of the Rules of this Court.

ARGUMENT

1. The petitioner in this case, Connell Construction Co., "a general contractor engaged in the construction industry

in Texas," alleged that the respondent Union violated the anti-trust laws by seeking and securing through the use of peaceful economic force (picketing) "a contract • • • whereby Connell agreed not to do any business with any plumbing and mechanical firm unless such firm was a party 'to an executed, current collective bargaining agreement' with the union." (*Connell Const. Co. Inc.* v. *Plumbers & Steam. Loc. U. No. 100*, 483 F.2d 1154, 1156 (C.A.5).)

Connell did *not*, however, allege that the Union action complained of was the product "of any conspiracy between the union and unionized subcontractors, nor does the proof allude to any such conspiracy;" instead Connell "bas[ed] its entire case on the theory that there was a sufficient anti-trust violation because the union had restricted Connell in the way that it carried on its business." (483 F.2d at 1165.)

Nor does Connell address, much less controvert the Court of Appeals' findings, fully supported by the record, that: in seeking and securing the subcontracting agreement the "plumbers' union is simply seeking to eliminate competition based on differences in labor standards and wages;" that the "agreement the union sought from Connell • • • is directly related to work attainment, work preservation, and other labor standards which directly benefit the members of the union involved;" and that "the only anticompetitive aspect [of the Union-Connell agreement] is that the unions have succeeded in eliminating that feature of competition based on lower standards or wages. There remain numerous other competitive devices." (483 F.2d at 1167, 1168, 1169.)[1]

[1] That court bottomed these findings on a meticulous review of the structure and practices of the construction industry:

Further, while Connell argues that the subcontracting agreement "cut[s] out" subcontractors from "the construction market" (Pet. Br. p. 18), there is nothing in the record to indicate that the Union's purpose was to restrict entry into that market; that any subcontractor, or class of subcontractors, who signed a collective agreement with the Union was unable to compete with the remaining subcontractors who observed union "labor standards and wages;" or, that the Union ever refused to sign a collective agreement with any subcontractor willing to meet union "labor standards and wages." The evidence is undisputed that the Union's "purpose [is] to try to organize the unorganized;" and that, for example, the Union had "tried to get a collective bargaining agreement with Texas Distributors," a non-union employer to whom Connell often subcontracted work, but that Texas Distributors "always seem[s] to back out at the last minute." (A. 79.) Thus, the subcontracting agreement does not foreclose the market for performing the subcontracts in question. The

"The central reason that the union wants the agreement sought in this case is that it will be helpful in organizing other subcontractors. The direct relation of this type agreement to that goal is clear. These agreements tend to eliminate any edge that a nonunionized subcontractor has in bidding on a job when that competitive edge rests solely or primarily on the fact that he pays less wages or grants lower working standards than the unionized subcontractor. Thus, the achievement of a contract such as the one here with Connell gives the union a strong weapon in its quest to unionize other subcontractors.

"It is clear in this case that the union is trying to get around an inherent situation which has long been recognized as making the construction industry unique in the field of labor relations. The core of this problem stems from the fact that work in the construction industry is ambulatory in na-

only condition for entry is that the subcontractor sign a collective agreement with the Union. So long as that condition is satisfied all options for entrepreneurial enterprise (other than those based on cutting "labor standards and wages") remain open.[2]

Accordingly, as this case reaches this Court it involves only an insistence by a union, acting pursuant to its own

ture and that there is a decided lack of continuity between the various parties—owner, general contractor, subcontractor, and employees—who are related to an individual project. The owner, of course, is basically the money source for the job which, by its nature, is obviously intended to be completed in a limited duration of time. The general contractor, with or without employees of his own, is the one who is actually in charge of getting the job done. As a general rule, the general contractor hires subcontractors, usually on the basis of competitive bids, who actually perform that construction which his own employees do not do. These subcontractors are independent businessmen and their relationship to the general contractor is limited to the duration of the job on which they are the successful bidder. The subcontractors have their own employees and in most instances the subcontractors are the immediate employers with whom the union has to deal.

"Thus, the union is faced with a fairly difficult problem because of the impact that the isolated general contractor has on the labor relations of the independent subcontractors. A permanent relationship with the subcontractor does not in any way ensure the union of a permanency of available work and thus differs from manufacturing where there is far more continuity between the parties dealing with the union and the ones in control.

"It can be readily seen that construction unions have a direct interest in seeing that general contractors hire subs using union labor • • •." (483 F.2d at 1167-1168.)

[2] In the Labor Management Relations Act, as amended, Congress has struck a careful balance between the rights of contractors, sub-

policy and in order to further its members' immediate and direct self-interest in the maintenance of union "labor standards and wages," that a contractor agree not to subcontract to employers whose employees perform work at less than union scale that is also performed by the union's members. The anti-trust laws do not reach such agreements.

2(a) With certain explicit exceptions not here relevant Congress has decreed that product markets shall be regulated through the system of commercial competition. In a series of enactments, beginning with § 6 of the Clayton Act and extending through the 1959 amendments to the Labor Management Relations Act, Congress has also de-

contractors, and unions in the construction industry. On the one hand, as demonstrated in the Union's brief, §§ 8(b)(4), 8(b)(7) and 8(e), permit unions in that industry (and the garment industry) to seek and secure subcontracting agreements of the type at issue here from contractors such as Connell. In all other industries union signatory subcontracting clauses are unlawful. (See Un. Br. pp. 11-32, and cases there cited.) On the other hand, the LMRA facilitates the entry of employers who are willing to meet union "labor standards and wages" into the construction market through § 8(f), which permits a compensating relaxation of the preconditions to collective bargaining set in §§ 7, 8(a)(2)& (5) & 8(b)(3). As the District of Columbia Circuit explained in *Local No. 150, International Union of Op. Eng.* v. *N.L.R.B.*, 480 F.2d 1186, 1188-1189: "Because of the unique situation in the construction industry" where "the vast majority of building projects are of relatively short duration" and where "labor agreements necessarily apply to jobs which have not been started and may not even be contemplated," § 8(f) "validates prehire agreements" in that industry, thereby dispensing with the generally applicable requirement "that a representative number of employees be hired and that a majority shall have designated the union as their bargaining representative prior to the execution of a valid exclusive bargaining contract."

termined that the labor market is to be regulated through a system in which working men and women are free to combine and to seek and secure agreements from employers establishing wages, hours, terms and conditions of employment. But these two markets are not watertight compartments. Thus, union activities in general, and union-employer agreements in particular, have an effect on commercial competition. To take the simplest possible example, employers cannot for long sell goods at less than the wage rate they pay their employees. In *Apex Hosiery Co.* v. *Leader*, 310 U.S. 469, 503-504 (hereafter "*Apex Hosiery*"), Chief Justice Stone stated the central principle for harmonizing the two disparate regulatory systems Congress has established:

> "[S]uccessful union activity, as for example consummation of a wage agreement with employers, may have some influence on price competition by eliminating that part of such competition which is based on differences in labor standards. Since, in order to render a labor combination effective it must eliminate the competition from non-union made goods, see American Steel Foundries v. Tri-City Central Trades Council, 257 U.S. 184, 209, an elimination of price competition based on differences in labor standards is the objective of any national labor organization. But this effect on competition has not been considered to be the kind of curtailment of price competition prohibited by the Sherman Act. See Levering & G. Co. v. Morrin [289 U.S. 103], supra; cf. American Steel Foundries Case, supra, 257 U.S. 209; National Ass'n of Window Glass Manufacturers v. United States, 263 U.S. 403."

In short, at least so long as the union is acting pursuant to its own policy (see pp. 7-13 *infra*), a union-employer agreement that constitutes a "direct frontal attack" (*Teamsters Union* v. *Oliver*, 358 U.S. 283, 294) on the "eliminat[ion]" of "differences in labor standards," whose effect on commercial competition is solely the consequence of eliminating those differences, is within the labor exemption to the anti-trust laws.

So far we are aware, during the 35 years that have elapsed since *Apex Hosiery* was decided there has not been so much as a word in any opinion in this Court questioning the basic principle stated therein (and just quoted). It is unnecessary at this juncture to review the period 1940 to 1964. In 1965, this Court in *Mine Workers* v. *Pennington*, 381 U.S. 657 (hereafter "*Pennington*") and *Meat Cutters* v. *Jewel Tea*, 381 U.S. 676 (hereafter "*Jewel Tea*") summarized the legislative materials and the prior case law and then explored in depth the extent to which the anti-trust laws apply to union-employer agreements. While the *Pennington-Jewel Tea* Court was sharply split on other issues, the binding force of *Apex Hosiery* was explicitly reaffirmed without dissent.

In his opinion for the Court in *Pennington* Mr. Justice White delineated the contours of the problem by contrasting the type of employe-union agreement clearly outside the labor exemption with the type of agreement at the heart of that exemption. He first provided a paradigm of the former:

> "If the UMW in this case, in order to protect its wage scale by maintaining employer income, had presented a set of prices at which the mine operators would be required to sell their coal, the union and the employers who happened to agree could not successfully defend this contract provision if it were chal-

lenged under the antitrust laws by the United States or by some party injured by the arrangement.

* * * *

"In such a case, the restraint on the product market is direct and immediate, is of the type characteristically deemed unreasonable under the Sherman Act and the union gets from the promise nothing more concrete than a hope for better wages to come." (381 U.S. at 663.)

Justice White then completed the contrast by stating:

"[W]ages lie at the very heart of those subjects about which employers and unions must bargain and the law contemplates agreements on wages not only between individual employers and a union but agreements between the union and employers in a multi-employer bargaining unit. * * * The union benefit from the wage scale agreed upon is direct and concrete and the effect on the product market, though clearly present, results from the elimination of competition based on wages among the employers in the bargaining unit, which is not the kind of restraint Congress intended the Sherman Act to proscribe. Apex Hosiery Co. v. Leader, 310 U.S. 469, 503-504." (*Id.* at 664.)

And, in his *Jewel Tea* opinion Mr. Justice White (joined by Chief Justice Warren and Mr. Justice Brennan) hewed to the central lesson of *Apex Hosiery* in answering in the affirmative the question:

"[W]hether the marketing-hours restriction [at issue there] like wages, and unlike prices, is so intimately related to wages, hours and working conditions that the union's successful attempt to obtain that provision through bona fide, arm's-length bargaining in

pursuit of their own labor union policies, and not at the behest of or in combination with nonlabor groups, falls within the protection of the national labor policy and is therefore exempt from the Sherman Act." (381 U.S. at 689-690; Footnote omitted.)

As Justice White explained:

"[A]lthough the effect on competition is apparent and real, perhaps more so than in the case of the wage agreement, the concern of union members is immediate and direct. Weighing the respective interests involved, we think the national labor policy expressed in the National Labor Relations Act places beyond the reach of the Sherman Act union-employer agreements on when, as well as how long, employees must work." (*Id.* at 691.)

In other words, so long as the union, as a matter of its own policy, seeks and secures agreements that provide "immediate and direct" labor benefits, the labor exemption to the anti-trust laws applies even though the consequential "effect on [commercial] competition is apparent and real." That exemption does not apply, however, where the agreement is focused on the "product market" and where the union benefit is the "hope for better wages to come" as a consequence of the employers' monopoly profits.

Similarly, Mr. Justice Goldberg's opinion in both *Pennington* and *Jewel Tea* (joined by Justice Stewart and Harlan) rested upon *Apex Hosiery*:

"Section 6 of the Clayton Act made it clear half a century ago that it is not national policy to force workers to compete in the 'sale' of their labor as if it were a commodity or article of commerce. The policy was

confirmed and extended in the subsequent Norris-La-Guardia Act. Other federal legislation establishing minimum wages and maximum hours takes labor standards out of competition. The Fair Labor Standards Act, 52 Stat. 1060, as amended, 29 U.S.C. §§ 201-219 (1958 ed.), clearly states that the existence of 'labor conditions' insufficient for a 'minimum standard of living * * * constitutes an unfair method of competition in commerce.' 29 U.S.C. at § 202(a). Moreover, this Court has recognized that in the Walsh-Healey Act, 49 Stat. 2036, as amended, 41 U.S.C. §§ 35-45 (1958 ed.), Congress brought to bear the 'leverage of the Government's immense purchasing power to raise labor standards' by eliminating substandard producers from eligibility for public contracts. Endicott Johnson Corp. v. Perkins, 317 U.S. 501, 507. See also Davis-Bacon Act, 46 Stat. 1494, 40 U.S.C. § 276a (1958 ed.). The National Labor Relations Act itself clearly expresses one of its purposes to be 'the stabilization of competitive wage rates and working conditions within and between industries.' 29 U.S.C. § 151. In short, business competition based on wage competition is not national policy and 'the mere fact of such restrictions on competition does not * * * bring the parties * * * within the condemnation of the Sherman Act.' Apex Hosiery Co. v. Leader, supra, 310 U.S., at 503.'' (381 U.S. at 710-711.)

Mr. Justice Douglas' *Pennington* and *Jewel Tea* opinions (in which he was joined by Justices Black and Clark) did not attempt a comprehensive restatement of the limits of the labor exemption. For, in his view (see 381 U.S. at 672-675, 735-736) both cases were controlled by the proposition, announced in *Allen Bradley Co.* v. *Union*, 325 U.S. 797, 808, that:

> ''Congress never intended that unions could, consistently with the Sherman Act, aid non-labor groups to create business monopolies and to control the marketing of goods and services.''

In *Allen Bradley*, that was the predicate for a finding of an anti-trust violation since there had been:

> ''industry-wide understandings, looking not merely to terms and conditions of employment but also to price and market control. Agencies were set up composed of representatives of all three groups [the union-contractor-manufacturer combination] to boycott recalcitrant local contractors and manufacturers and to bar from the [New York City] area equipment manufactured outside its boundaries.'' (325 U.S. at 799-800.)

But *Allen Bradley* distinguished the class of cases governed by that holding from those governed by *Apex Hosiery:*

> ''Employers and the union did here make bargaining agreements in which the employers agreed not to buy goods manufactured by companies which did not employ the members of Local No. 3. We may assume that such an agreement standing alone would not have violated the Sherman Act. But it did not stand alone. It was but one element in a far larger program in which contractors and manufacturers united with one another to monopolize all the business in New York City, to bar all other business men from that area, and to charge the public prices above a competitive level. It is true that victory of the union in its disputes, even had the union acted alone, might have added to the cost of goods, or might have resulted in individual refusals of all of their employers to buy electrical equipment not made by Local No. 3. So far as the union might have achieved this result acting alone, it would have been the natural consequence of labor union activities exempted

> by the Clayton Act from the coverage of the Sherman Act. Apex Hosiery Co. v. Leader, supra, 310 U.S. 503. But when the unions participated with a combination of business men who had complete power to eliminate all competition among themselves and to prevent all competition from others, a situation was created not included within the exemptions of the Clayton and Norris-La Guardia Acts." (325 U.S. at 809.)

In sum, as Mr. Justice Brennan recognized in *Musicians Federation* v. *Carroll*, 391 U.S. 99, 106, while much concerning the labor exemption remains in doubt, the central and unanimous point of this Court's cases from *Apex Hosiery* through *Pennington* and *Jewel Tea* is that so long as the union is not aiding an employer conspiracy to restrain trade the "Norris-LaGuardia Act [has taken] all 'labor disputes' as therein defined outside the reach of the Sherman Act," and that this Court has therefore "recognized that a legitimate aim of any national labor organization is to obtain uniformity of labor standards and that a consequence of such union activity may be to eliminate competition based on differences in such standards. United Mine Workers of America v. Pennington, 381 U.S. 657, 666."

Thus, in *Carroll*, the Court, drawing on the holding of *Teamsters Union* v. *Oliver*, 358 U.S. at 294, and on the "analyses of Mr. Justice White and Mr. Justice Goldberg in *Jewel Tea*," concluded that a union-imposed scale of prices (the "price list requirement") was "brought within the labor exemption under [a] finding that the requirement is necessary to assure that scale wages will be paid to [employee musicians]." (391 U.S. at 112.)

Since that is the law, there can be no doubt that the labor exemption applies in this case. For, the Court of Appeals found: that the record here contained no "proof * * * [of] any [employer-union] conspiracy" to restrain trade; that the evidence demonstrated that "the only anti-competitive aspect [of the Union-Connell agreement] is that the unions have succeeded in eliminating that feature of competition based on lower standards or wage:" and, that the subcontracting agreement was not simply "a direct and frontal attack upon a problem thought to threaten the maintenance of the basic wage structure" (*Teamsters Union* v. *Oliver*, 358 U.S. at 294), but, given the nature of the construction industry, the only direct and frontal means of attacking that problem. (See pp. 1-5 *supra*.)

(b) This conclusion is confirmed by a survey of the areas of disagreement manifested in the *Pennington*, *Jewel Tea* and *Carroll* opinions. For in each instance those disagreements stemmed from factors not present here.

In *Pennington* the controversy within the Court concerned the nature and the quantum of proof necessary to show the existence of an *Allen Bradley* conspiracy.[3] Mr. Justice White stated:

> "A union forfeits its exemption from the anti-trust laws when it is clearly shown that it has agreed with one set of employers to impose a certain wage scale on other bargaining units. One group of employers may not conspire to eliminate competitors from the industry and the union is liable with the employers if it becomes a party to the conspiracy. This is true

[3] The Court returned to that issue in *Ramsey* v. *Mine Workers*, 401 U.S. 314, and there reaffirmed *Pennington's* holding. (401 U.S. at 312-313; see also *id* at 319-320 (Douglas J., dissenting).)

even though the union's part in the scheme is an undertaking to secure the same wages, hours or other conditions of employment from the remaining employers in the industry." (381 U.S. at 665-666.)

Even that proposition was subject to the following qualification—of immediate significance here:

"Unilaterally, and without agreement with any employer group to do so, a union may adopt a uniform wage policy and seek vigorously to implement it even though it may suspect that some employers cannot effectively compete if they are required to pay the wage scale demanded by the union. The union need not gear its wage demands to those which the weakest units in the industry can afford to pay. Such union conduct is not alone sufficient evidence to maintain a union-employer conspiracy charge under the Sherman Act. There must be additional direct or indirect evidence of the conspiracy. There was, of course, other evidence in this case, but we indicate no opinion as to its sufficiency." (*Id.* at 665, n.2.)

Mr. Justice Douglas agreed, adding that:

"First. On the new trial the jury should be instructed that if there were an industry-wide collective bargaining agreement whereby employers and the union agreed on a wage scale that exceeded the financial ability of some operators to pay and that if it was made for the purpose of forcing some employers out of business, the union as well as the employers who participated in the arrangement with the union should be found to have violated the antitrust laws.

"Second. An industry-wide agreement containing those features is prima facie evidence of a violation." (*Id.* at 672-673.)

Mr. Justice Goldberg, however, disagreed, stating:

"The Court should hold that, in order to effectuate congressional interest, collective bargaining activity concerning mandatory subjects of bargaining under the Labor Act is not subject to the antitrust laws." (*Id.* at 710; footnote omitted.)

Justice White's position was, therefore, that the antitrust laws govern union activity concerning working conditions undertaken to further an *employer conspiracy* to eliminate competitors, and that the existence of a multi-employer agreement containing a "most favored nations" clause is probative evidence of such a conspiracy; Justice Douglas also regarded proof of predatory purpose as essential but it was his view that such an industry-wide agreement is "*prima facie* evidence of a violation;" and, Justice Goldberg's position was that union activity concerning "mandatory collective bargaining is completely protected" (*id.* at 710).

In the instant case there is no evidence of an employer-union conspiracy "to eliminate competition from the industry," or that the Union's "wage scale * * * exceeded the financial ability of some operators to pay," or that the agreements in force were "made for the purpose of forcing some employers out of business." Rather, here as in *Jewel Tea*, the "case comes to [the Court] stripped of any claim of union-employer conspiracy against [the complaining employer]." (381 U.S. at 688.) Thus, the conflicting views with respect to the probative value of a multi-employer collective agreement in establishing the existence of an *Allen Bradley* conspiracy need not be resolved. (Compare 483 F.2d at 1162-1165 discussing *Pennington*, *Jewel Tea* and

the Fifth Circuit's synthesis of those cases in *Cedar Crest Hats, Inc.* v. *United Hatters*, 362 F.2d 322, 326-327.)

Jewel Tea involved the legality of a "restriction • • • ('market operating hours shall be 9:00 a.m. to 6:00 p.m. Monday through Saturday inclusive') • • • contained in a collective bargaining agreement executed after joint multi-employer, multi-union negotiations." (381 U.S. at 688.) As we have seen (pp. 8-9), Mr. Justice White stated that in the absence of an anti-competitive employer-union conspiracy, agreements that provide "immediate and direct" labor benefits are within the labor exemption even though the "effect on competition is apparent and real." Under that test:

> "[T]he dispute between Jewel and the unions essentially concern[ed] a narrow factual question: Are night operations without butchers, and without infringement of butchers' interests, feasible? The District Court resolved this factual dispute in favor of the unions. • • • [And,] Jewel's argument[s] • • • fall far short of a showing that the trial judge's ultimate findings were clearly erroneous." (*Id.* at 694; 697.)

As we have also seen, Mr. Justice Goldberg argued for a broader view of the labor exemption. (P. 15.) He therefore joined Mr. Justice White in concluding that no violation of the anti-trust laws had been proved in *Jewel Tea* although he disagreed with Justice White that it had been critical for the union to prove that "night operations without butchers and without infringement of butchers' interests [was not] feasible." (*Id.* at 727.) For Justice Goldberg it was sufficient that

> "[I]f the self-service markets could operate after 6 p.m., without their butchers and without increasing the work of their butchers at other times, the result of such operation can reasonably be expected to be either that the small, independent, service markets would have to remain open in order to compete, thus requiring their union butchers to work at night, or that the small, independent, service markets would not be able to operate at night and thus would be put at a competitive disadvantage. Since it is clear that the large, automated self-service markets employ less butchers per volume of sales than service markets do, the Union certainly has a legitimate interest in keeping service markets competitive so as to preserve jobs. Job security of this kind has been recognized to be a legitimate subject of union interest." (*Id.* at 727-728; footnote omitted.)

Finally, Mr. Justice Douglas apparently agreed with the test governing non-*Allen Bradley* cases stated by Mr. Justice White but disagreed that the union had demonstrated "a necessary connection between marketing hours and working hours." (*Id.* at 737-738.) He would have reversed the District Court's finding to that effect as contrary to the "undisputed" evidence. (*Id.* at 738.)

The distinction between the instant case and *Jewel Tea* is two fold, and in both particulars the difference cuts in favor of the Union here. First, in this case, in contrast to *Jewel Tea*, there can be no doubt that the subcontracting agreement provides "immediate and direct" labor benefits. Second, in the instant case there is no evidence that observance of uniform labor conditions places any employer at a competitive disadvantage or otherwise interferes with competition based on entrepreneurial skill as opposed to competition based on substandard labor conditions. In *Jewel Tea* the marketing hours restriction bore more heav-

ily on one class of employer (those operating self-service meat markets) in that it served to restrict competion through the means of "keep[ing] their doors open long hours to meet the convenience of customers." (381 U.S. at 737; Douglas, J., dissenting.)

The central issue in *Carroll* for present purposes was the legality of the "price list" to be charged by orchestra leaders for "club date" engagements imposed by the musicians' union. On that issue the Court stated: "The critical inquiry is whether the price floors in actuality operate to protect the wages of the [union-member-employee] subleader[s] and sidemen;" and agreed with the lower courts "that the price floors were expressly designed to and did function as a protection of sidemen's and subleaders' wage scales against the job and wage competition of the leaders." (391 U.S. at 108.) Mr. Justice Brennan went on to hold that the price list was lawful whether or not the orchestra leader was an active performer since "the price of the product—here the price for an orchestra for a club-date—represents almost entirely the scale wages of the sidemen and the leader * * * Therefore, if leaders cut prices, inevitably wages must be cut." (*Id.* at 112.)

Mr. Justice White joined by Mr. Justice Black, agreed with the majority that the "price list" was within the labor exemption so long as the leader

> "does work—playing and leading—which is also done by union members, and for which the union has a proper concern. The union thus has a right to see that the respondent does not perform that work for less than the going scale for union musicians and subleaders. Since the leader fixes a single charge to compensate him for both leading and organizing, the union can require the leader to make that charge not less than the union scale for a subleader plus the leader's costs in obtaining the engagement, hiring the musicians, and planning the program." (*Id.* at 116.)

But Justice White disagreed that the labor exemption covered the "imposition of fixed minimum charges by leaders for engagements at which they do not themselves lead":

> "For such engagements the role of the leader is solely that of entrepreneur * * *. The union has of course a full right to impose on this leader, who is in effect an employer, its minimum scale for work by sidemen and subleaders. The musicians union, however, goes further. * * * The union is clearly requiring that the leader charge his customer more than the total of the leader's wage bill, even though the leader himself does no 'labor group' work." (*Id.* at 117.)

Thus, Justice White, but not the majority, viewed *Carroll* as a case where in part the union imposed product market restraints unnecessary to protect its employee-members' labor conditions. Such a restriction would, as Justice White argued, be contrary to the central tenet of a system of commercial competition under the anti-trust laws and would be devoid of a compensating basis in the regulatory system Congress has evolved for the labor market. But, as we have stressed throughout, there is no such interference with commercial competition in the instant case. On the contrary, here the subcontracting agreement was the product of the Union's own policy and constituted a "direct frontal attack" (*Teamsters Union* v. *Oliver*, 358 U.S. at 294) on the "elimination" of "differences in labor standards" (*Apex Hosiery*, 310 U.S. at 503-504), whose effect

on commercial competition was solely the consequence of eliminating those differences. It is established beyond peradventure of doubt by this Court's decisions that such an agreement is within the labor exemption to the antitrust laws.[4]

[4] Connell, citing and relying on *Columbia River Packers* v. *Hinton*, 315 U.S. 143, 146-147, argues "Union has no labor dispute with Connell. It does not seek to represent a single employee of Connell, but only to regulate with whom Connell may do business, outside of any employer-employee relationship." But, as this Court later stated, *Hinton* involved only "a dispute between groups of businessmen revolving solely around the price at which one group would sell commodities to another group." (*Allen Bradley*, 325 U.S. at 807 n. 12.) The applicable precedent here is *Milk Wagon Drivers', etc.* v. *Lake Valley Farm Products*, 311 U.S. 91. In that case drivers employed by dairies under union contracts had lost their jobs because their employers were being undersold by other dairies who sold milk to independent vendors who owned and operated their own trucks and in turn sold the milk to previous customers of the union dairies. The union believed that the dairies who used the vendor system were able to sell milk at lower prices than the union dairies because "the vendors worked long hours, under unfavorable working conditions, without vacations, and with very low earnings." (*Id.* at 95.) Accordingly, it picketed and engaged in other activities to force the vendors into their union, where they would be forbidden to handle the milk as vendors. This Court unanimously held the controversy to be a "labor dispute" within the meaning of the Norris-LaGuardia Act, holding:

> "Whether rightly or wrongly, the defendant union believes that the 'vendor system' was a scheme or device utilized for the purpose of escaping the payment of union wages and the assumption of working conditions commensurate with those imposed under union standards. To say, as the Circuit Court of Appeals did, that the conflict here is not a good faith labor issue, and that therefore there is no 'labor dispute,' is to ignore the statutory definition of the term; to say, further, that the conditioned abandonment of the vendor system, under the circumstances, was an issue unrelated to labor's effort to improve working conditions, is to shut one's eyes to the everyday elements of industrial strife." (311 U.S. at 98-99.)

In the instant case it is clear that the Union acted on the entirely rational belief that Connell's subcontracting of work to non-union employers was a "device utilized for the purpose of escaping the payment of union wages and the assumption • • • of union standards," and that the Union's response was directly and immediately "related to labor's effort to improve working conditions." (See pp. 1-5 supra.) Connell's attempt to make it appear that this is a case like that envisaged by Mr. Justice White in *Pennington* (in which a union cooperates with an employer restraint of commercial competition in a "hope for better wages to come" (381 U.S. at 663)) is the product of the Company's successful effort "to shut [its] eyes to the everyday elements of industrial strife."

Connell also attempts to inject into this case the employer-union conspiracy issue that was central to the *Pennington* litigation (see pp. 13-15 *supra*) by arguing that the subcontracting agreement is subject to attack since, until 1973, the underlying collective agreement between the Union and the subcontractors contained a "most favored nations" clause. (Pet. Br. pp. 12-16.) We agree with the Union that in this declaratory judgment action that argument was mooted when the clause was eliminated from the underlying collective agreement. (Un. Br. p. 10, n. 3, and cases there cited.) In any event, as Judge Swygert stated in *Associated Milk Dealers, Inc.* v. *Milk Drivers U., Local 753*, 422 F.2d 546, 554 (C.A. 7):

> "[A] majority of the Supreme Court in *Pennington* requires proof of predatory purpose as a prerequisite to finding that a most favored nation clause violates the antitrust laws."

There is no "proof of predatory purpose" in this case. (See pp. 1-5 *supra*.)

The Chamber of Commerce also ranges far afield by arguing that "whenever a union's conduct violates the proscriptions of the labor laws it forfeits its antitrust exemption." (C. of C. Br. p. 9, see *id.* pp 10-15.) That suggestion is too insubstantial to merit more than this footnote. As developed in the Union's brief, when Congress wished to regulate union activities that have an "immediate and

CONCLUSION

For the above noted reasons as well as those stated by the respondent the judgment of the Court of Appeals should be affirmed.

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direct" impact on labor conditions, that was accomplished through the prohibitions and the remedies declared in the LMRA, and a return to regulation through the anti-trust laws was explicitly rejected. (See Un. Br. pp. 32-43. For a complete discussion of the evolution of the labor laws in the respects relevant here, see also 381 U.S. at 700-709 (Goldberg, J., concurring and dissenting).) It is necessary to add only that while the Chamber relies on the *Carroll* case (C. of C. Br. p. 10), the precise contention it makes here was made by the cross-petitioner in that case (Br. for Cross—Pet. in Nos. 309-310, Oct. Term, 1967 pp. 71-72, 75-78) and was rejected—this Court holding that a union retained its labor exemption even where it required a closed shop and refused to bargain; both, of course, practices declared unlawful by the LMRA. (391 U.S. at 106-107.) The anti-trust laws and the LMRA are not concurrent overlapping regimes neither preempting the other, they are radically different systems of regulation each directed toward different ends in different markets. And Congress has determined to "proscribe union activities," that are not part of an *Allen Bradley* conspiracy, but are in Congress' "judgment • • • detrimental to the public good" (381 U.S. at 707 (Goldberg, J., concurring and dissenting)), exclusively through the LMRA.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973.

No. 73-1256

CONNELL CONSTRUCTION COMPANY, INC.,
Petitioner,

vs.

PLUMBERS AND STEAMFITTERS LOCAL UNION NO. 100 OF UNITED ASSOCIATION OF JOURNEYMEN AND APPRENTICES OF THE PLUMBING AND PIPE-FITTING INDUSTRY OF THE UNITED STATES AND CANADA, AFL-CIO,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

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BRIEF ON BEHALF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS AMICUS CURIAE.

INTEREST OF THE AMICUS CURIAE.*

The Chamber is a federation consisting of a membership of over 3,700 state and local chambers of commerce and trade and professional associations, a direct business membership in excess of 38,000 and an underlying membership of approxi-

* Consents of all parties to the Chamber's participation have been filed with this Court.

mately 5,000,000 business firms and individuals. It is the largest association of business and professional organizations in the United States.

The Chamber regularly represents the interests of its member-employers in important labor relations matters vitally affecting those interests. Such representation constitutes a significant aspect of the Chamber's functions. Accordingly, the Chamber has sought to advance those interests in a wide spectrum of labor relations litigation before this Court.*

The ultimate question presented in the instant case is whether a building trade union violates the antitrust laws by compelling an employer with whom it has no collective bargaining relationship to execute an agreement requiring it to cease doing business with nonunion employers and restricting the persons within the construction industry with whom the employer may do business to those who have a collective bargaining agreement with that union. However, as a necessary prerequisite to the resolution of this ultimate issue, this Court must determine the extent to which a labor union is immune from the antitrust laws and whether union conduct serves a "legitimate union interest" when that conduct is contrary to the policies of and proscriptions of the National Labor Relations Act, as amended.** And, necessary to the resolution of this fundamental question in the instant case,

* *E.g., Howard Johnson Company Inc.* v. *Detroit Local Joint Executive Board*, No. 73-631 (1974); *Super Tire Engineering Company, Supercap Corporation and A. Robert Schaevitz* v. *Lloyd W. McCorkle, et al.*, No. 72-1554 (1974); *Marco DeFunis and Betty DeFunis, his wife; Marco DeFunis, Jr. and Lucia DeFunis, his wife* v. *Charles Odegaard, President of the University of Washington, et al.*, No. 73-235 (1974); *Corning Glass Works* v. *Brennan*, No. 73-29; *N. L. R. B.* v. *Bell Aeraspace Company Division of Textron, Inc.*, No. 72-1598 (1974); *Boys Markets* v. *Retail Clerks Union*, 398 U. S. 235 (1970); *N. L. R. B.* v. *The Boeing Company, et al.*, 412 U. S. 84 (1973); *N. L. R. B.* v. *Granite State Joint Board*, 409 U. S. 213 (1972); *N. L. R. B.* v. *Burns Int'l. Security Services, Inc.*, 405 U. S. 272 (1972); *N. L. R. B.* v. *Pittsburgh Plate Glass Co.*, 404 U. S. 517 (1971); *H. K. Porter Co.* v. *N. L. R. B.*, 397 U. S. 99 (1970).

** 61 Stat. 136, 73 Stat. 519, 29 U. S. C. 151, et seq.

this Court is called upon for the first time to delineate and interpret the so-called construction industry proviso to Section 8(e) of the National Labor Relations Act. Specifically, the Court must decide whether the national labor policy, as expressed in the NLRA, permits an interpretation of the proviso that allows a building trade union to coerce from general contractors with whom the union has no collective bargaining relationship an agreement that concentrates in the union power to allocate the available market and thereby restrain free competition among economic units.

These questions are of particular concern to the Chamber's members since a significant number of them are users of construction products and services and are directly affected by designs which deprive them of the advantages of a competitive market that the antitrust laws are designed to foster.

Moreover, because of the ramifications of any decision rendered by the Court herein, in terms of the effect of that decision in clarifying and providing direction in areas of law that have invited misunderstanding, the Chamber is exceedingly interested that the questions presented herein by properly resolved. Because of its broad representation of employers, the Chamber is in a position to present arguments to the Court to aid its deliberations which might not otherwise be advanced by the parties.

SUMMARY OF THE ARGUMENT.

This case presents this Court with two questions of major importance to great numbers of affected employees, employers and unions. The first of these questions concerns the appropriate criteria to be utilized to determine when a labor union retains or forfeits its exemption from the prohibitions of the Sherman Act. The court below found that a union retains its antitrust immunity any time it engages in any conduct that promotes its own interests, notwithstanding that its activities may be interdicted by the National Labor Relations Act and alien to the nation's labor policy. In reaching its decision, the court below committed an analytical error of critical significance. Indeed, the court's analysis has been precisely and emphatically rejected in decisions of this Court.

This Court's decisions, instead, demonstrate that the activities of a union retain their exemption from the Sherman Act so long as they may be characterized as fostering a union's legitimate interests. A union's conduct may be so described only to the extent it comports with and is protected by national labor policy. This policy is reflected by the mandates, design and objectives of the Labor Act. Consequently, whenever a union engages in conduct that transgresses the dictates of the Labor Law the union thereby forfeits its exemption from the Sherman Act. This analysis is endorsed by the teaching in *Local 189, Meatcutters* v. *Jewel Tea Co.*, 381 U. S. 676 (1965), where this Court said that conduct protected by the national labor policy is *therefore* exempt from the Sherman Act. It follows that conduct proscribed by the Labor Act would lose its exemption. Otherwise, any union conduct regardless of its incompatability with the nation's labor policy could nonetheless be exempt from the Antitrust Act, a result rejected by this Court in *Jewel Tea*.

In this case the Respondent Union, through picketing, compelled an employer with whom it had no collective bargaining relationship and whose employees it did not represent to execute an agreement requiring that employer to cease doing business with non-union employers and restricted the persons within the construction industry with whom the employer could do business to those who had bargaining agreements with that Union. This conduct is proscribed by the Labor Act and therefore is not protected by the nation's labor policy. Section 8(e) of the Labor Act outlaws collective agreements between a union and an employer whose objective is to require an employer to restrict business relations to persons endorsed by the union. While a proviso to that Section immunizes certain construction industry agreements, this immunization is limited to agreements voluntarily entered into between parties enjoying a collective bargaining relationship. The agreement compelled by the Union in this proceeding did not meet these prerequisites, and was therefore not exempted from the proscriptions of Section 8(e). Accordingly, the Union, by engaging in this activity, and by otherwise engaging in conduct also violative of the labor laws and national labor policy has lost its antitrust immunity.

Having forfeited its Sherman Act immunity through its pervasive, anti-competitive unlawful conduct, the second question presented is whether the Union has also violated the Antitrust Laws.

The Union's conduct here has an indisputably deleterious effect upon free competition and produces an inescapable benefit for a favored class of employees. Consequently, the Union acting alone, by this conduct, has violated the prohibitions of the Sherman Act. Indeed, the conduct of the Union here effectuates a total control of economic power for the benefit of those employers whom it prefers, insulating them from market competition and depriving the public of the advantages of free trade. This is precisely the conduct interdicted by the Sherman Act.

ARGUMENT.

INTRODUCTION.

In the case before this Court, the Respondent Union, through picketing, has forced the Petitioner Connell, a general contractor, to execute an agreement which prohibits Connell from contracting with mechanical subcontractors for their services on any construction projects in the Dallas area unless those subcontractors are bound to a particular collective bargaining agreement with the Union. This agreement, its procurement and its maintenance, are not the product of collective bargaining between Connell and the Union, for there is no collective bargaining relationship between them. Nor does the Union have any organizational interest in Connell's employees because Connell employs no tradesmen of the category represented by the Union. Indeed, by the terms of the agreement coerced by picketing from Connell, the Union specifically disavowed any interest in representing Connell's employees.[1]

1. The terms of the agreement obtained from Connell, (Def.'s Ex. No. 9, App. 138-140), in relevant part, provide:

> "WHEREAS, the contractor and the union are engaged in the construction industry, and
>
> WHEREAS, the contractor and the union desire to make an agreement applying in the event of subcontracting in accordance with Section 8(e) of the Labor-Management Relations Act;
>
> WHEREAS, it is understood that by this agreement the contractor does not grant, nor does the union seek, recognition as the collective bargaining representative of any employees of the signatory contractor; and
>
> WHEREAS, it is further understood that the subcontracting limitation provided herein applies only to mechanical work which the contractor does not perform with his own employees but uniformly subcontracts to other firms;
>
> THEREFORE, the contractor and the union mutually agree with respect to work falling within the scope of this agreement that is to be done at the site of construction, alteration, painting, or repair of any building, structure, or other works, that if the contractor should contract or subcontract any of the aforesaid work falling within the normal trade jurisdiction of the union, said contractor shall contract or subcontract such work only to firms that are parties to an executed, current collective bargaining agreement with Local Union 100 of the United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry."

Moreover, the Union's objective could not have been an organizational interest in the employees of the mechanical subcontractor on the job site picketed, nor to gain or preserve any work for its members on that site, since the mechanical subcontractor on that job site already employed members of the Union and had a collective bargaining agreement with it.[2] Plainly, the agreement obtained from Connell was an *in futuro* agreement, the effect of which is to limit the construction market available to Connell or any similar contractor to *only* those subcontractors signatory to a standard master labor agreement with the Union.[3] In this manner the Union sought a restriction on the relevant market and a restriction on competition through the elimination of an entire class of persons with whom Connell could do business.

The record here establishes that such a restrictive contracting agreement as that obtained from Connell was similarly obtained from several other general contractors in the Dallas area.[4] As a result of such extensive Union conduct, Connell and the other general contractors who have been forced to sign the subcontracting agreement are restrained from contracting for the services of subcontractors unless the latter enter into the labor agreement which the Union offers them. By such conduct, the Union necessarily has the power to control the entire construction market in the area and exclude therefrom all subcontractors who have not executed the master area agreement. Indeed, by entering into collective bargaining arrangements with certain

2. Record, at 20, App. at 61; Opinion of the Court of Appeals, 483 F. 2d 1154, 84 LRRM 2001, 2002 (CA 5, 1973).

3. Record at 44-49, App. at 72-77.

4. Record at 50, App. 77-78.

subcontractors and declining to do so with others, the Union retains the right to create a favored group of employers in the market. Thus, precluded from competition by the Union's conduct herein are the services of numerous mechanical contractors who ordinarily contract with the general contractors for specific units of construction. The market control exerted by the Union here effects the allocation of such unitized services, and is not directed to the elimination of competition based solely upon the wages paid for labor, for the Union's conduct eliminates all subcontractors having no bargaining relationship with the Union, *regardless* of whether Union wage standards are met by those subcontractors and *regardless* of whether the same or better wages are being paid pursuant to an agreement with a rival union.

Further, as noted, the Union has the power and may, at its option, simply refuse to offer any subcontractor the master agreement at all, preferring to allocate the available market to those contractors who utilize its present members, rather than to execute new agreements which would require it to accept as members the employees of previously nonunion subcontractors.

The Chamber submits and will establish that, divorced from any collective bargaining context and having no organization or work preservation objective, the Union's so-called subcontractors' agreement, its procurement and maintenance are activities and conduct which are contrary to the policies of the National Labor Relations Act, are violative of specific prohibitions of that Act, and therefore, serve no legitimate union interest. Accordingly, the Union's activities are not exempted from the proscriptions of the Sherman Antitrust Act.[5] Moreover, since the Union's conduct has the effect of substantially restraining the Dallas area market in construction services, the Union's non-exempt conduct constitutes an unlawful restraint of trade. This analysis is completely consonant with that of this Court in *Jewel Tea*.[5a] The

5. 15 U. S. C. Sec. 1 and 2.

5a. *Local 189, Meat Cutters* v. *Jewel Tea Co.*, 381 U. S. 676 (1965).

court below, however, failed to adhere to *Jewel's* teaching and this failure caused it to make an analytical error of critical importance. Thus, the court concluded that a union retains its antitrust exemption whenever it engages in any conduct promoting its own interests regardless of whether that conduct is contrary to the national labor policy and prohibited by the NLRA. Accordingly, the court did not consider the antitrust aspect and effects of the Union's conduct and dismissed this antitrust suit by concluding that since the Union's conduct herein was arguably an unfair labor practice, it was subject to exclusive regulation by the National Labor Relations Board under the NLRA.

In effect, the majority below failed properly to resolve this case by engaging in reasoning which segregated, rather than accommodated, the operation of the antitrust laws and that of the labor laws, in disregard of relevant teachings of this Court.

A.

THE ACTIVITIES OF A UNION MUST BE PROTECTED BY THE NATIONAL LABOR POLICY IN ORDER TO BE EXEMPT FROM THE SHERMAN ACT.

The resolution of the issues confronting this Court necessitates the accommodation of the nation's antitrust policy with the national labor policy.

A union retains its exemption from the proscriptions of the Sherman Act so long as its conduct may fairly be characterized as furthering a union's "legitimate interests". *Jewel Tea, supra.* Those interests remain "legitimate" only to the extent they are consonant with the national labor policy as expressed in the content and philosophy of the National Labor Relations Act. Accordingly, whenever a union's conduct violates the proscriptions of the labor laws it forfeits its antitrust exemption. Whether an antitrust violation results, becomes a function of the impact of the union's conduct on the marketplace. In the absence of a union's violation of the labor laws, it may retain its antitrust

immunity if the anti-competitive nature of its acts is outweighed by the benefits afforded its members, achieved through conduct comporting with the objectives of the labor laws. In sum, unions' Sherman Act exemption is lost either by conduct which violates the labor laws or as a consequence of the balancing of relative benefit and harm which reveals an undue restriction on competition.

This analysis is endorsed in *Jewel Tea*:

> "Thus the issue in this case is whether the marketing-hours restriction like wages, and unlike prices, is so intimately related to wages, hours and working conditions that the unions' successful attempt to obtain that provision through bona fide arms-length bargaining in pursuit of its own labor union policies, and not at the behest of or in combination with nonlabor groups, *falls within the protection of the national labor policy and is therefore exempt from the Sherman Act.*"

The "national labor policy" to which the *Jewel* Court referred consisted of the guarantees and duties contained in and inferrable from the National Labor Relations Act. It follows, since conduct *protected* by that Act was said to be "therefore" exempt from Sherman, that conduct *proscribed* by the Labor Act would "therefore" lose the exemption. Otherwise, no union conduct could fall outside the sanction of the "national labor policy", and the labor exemption could therefore never be lost, a conclusion specifically rejected by this Court in *Jewel Tea*. Further, with respect to union's anticompetitive conduct which does not affirmatively breach the labor laws, support for the foregoing analysis is similarly derived from the Court's decision in *American Federation of Musicians* v. *Carroll*.[6] There, in the absence of charges of otherwise unlawful conduct, the majority emphasized, quoting *Jewel Tea*:

> " '[t]he crucial determinant is not the form of the agreement —*e.g.*, prices or wages—but its *relative* impact on the product market and the interests of union members.' " (emphasis added)

6. 391 U. S. 99 (1968).

The notion that in such cases the accommodation of labor and antitrust policy compels the weighing of competing interests appears pointedly in Mr. Justice White's *Carroll* dissent:

> "On the other hand price competition, a significant aid to satisfactory resource allocation and a deterrent to inflation, would be substantially diminished if industry-wide unions were free to dictate uniform prices through agreements with employers. *I have always thought that this strong policy outweighed the legitimate union interest in the prices at which employers sell*, and until today I had thought that the Court agreed. (Emphasis added; footnote omitted)

The foregoing formulation represents a general scheme for the accommodation of this nation's labor and antitrust policies. The legitimacy of these principles derives support from this Court's prior decisions which have effected an accommodation of these national policies. Those decisions similarly demonstrate an emerging labor policy under which unions' secondary conduct, such as is involved in this case, is not exempt from the Sherman Act.

The History of the Accommodation Permitting Labor Unions' Exemption from the Antitrust Laws.

The history of labor's exemption reveals that it has never been extended beyond the scope of legitimate labor activities involving the working conditions of employees in a given bargaining unit; that it has depended on whether the unions' activities have affected the product market in interstate commerce; and that it has depended on an accommodation of the federal labor and antitrust policies.

a. Early Application of the Sherman Act; Loewe v. Lawlor.

Unions have claimed total exemption from antitrust liability without success since the Sherman Act was passed in 1890. In 1908, the United States Supreme Court held that unions were subject to the Sherman Act of 1890, if the union's purpose was

to prevent the interstate shipment of goods, *Loewe* v. *Lawlor*, 208 U. S. 274, 301 (1908). The *Loewe* case (often called the "Danbury Hatters" case) involved a nationwide (secondary) product boycott. The Court examined the Sherman Act and found that Congress intended the act to apply equally to all classes, and that labor unions were properly subject to the 1890 Act.

b. The Clayton Act of 1914; Duplex Printing Press v. Deering; the Second Coronado Case.

Congress granted labor partial exemption from the antitrust laws by virtue of Section 6 and 20 of the Clayton Act of 1914. 15 U. S. C. Sec. 17; 20 U. S. C. Sec. 52. The Supreme Court, however, held that Section 6 did not grant labor antitrust immunity "where . . . [unions] depart from normal and legitimate objects". The Court explained:

> "And by no fair or permissible construction can it [Section 6] be taken as authorizing activity otherwise unlawful, or enabling a normally lawful organization to become a cloak for an illegal combination or conspiracy in restraint of trade . . ., and engage in an actual combination or conspiracy of trade", *Duplex Printing Press Co.* v. *Deering*, 254 U. S. 443, 469 (1921).

The *Duplex* case, like the *Loewe* case, involved a secondary product boycott. The Court held the boycott an unlawful combination in restraint of trade, finding also that Section 20 of the Clayton Act was not intended to apply either to unlawful acts or to secondary boycotts. The Court analyzed the language of Section 20, as follows:

> "The emphasis placed on the words 'lawful' and 'lawfully', 'peaceful' and 'peacefully', and the reference to the dispute and the parties to it, strongly rebut a legislative intent to confer a general immunity for conduct violative of the antitrust laws, or otherwise unlawful. The subject of the boycott is dealt with specifically in the 'ceasing to patronize' provision and by the clear force of the language employed the exemption is limited to pressure exerted upon a party to such dispute by means of peaceful and *lawful* influences upon neutrals." 254 U. S. 473 (Emphasis the Court's)

The effect of Section 20 of the Clayton Act was to exempt primary, but not secondary, disputes from the proscriptions of the antitrust laws and then only if the unions acted in a lawful and peaceful manner.

c. Apex Hosiery Co. v. Leader.

In *Apex Hosiery* v. *Leader*, 310 U. S. 469 (1940), this Court reaffirmed the principle that union activities were not exempt from the reach of the Sherman Act. *Id.* at 487-89. That case involved a primary strike the effect of which was to severely curtail the operations only of the primary employer against whom the strike was conducted. In that context the Court found that although the union's actions constituted a restraint on the interstate transportation of merchandise, there was an insufficient showing that such primary action resulted in a "restraint of trade or commerce" as required by the condemnations of the Sherman Act. *Id.* at 490. Thus, there was insufficient ". . . restraints to free competition in business and commercial transactions which tended to restrict production, raise prices, or otherwise control the market to the detriment of purchasers or consumers of goods and services . . ." *Id.* at 493. While the strike against Apex delayed the shipments of hosiery from the Apex plant in a fashion which severely impacted on interstate commerce, it had no effect on the price of hosiery on the market and thus did not constitute a restraint forbidden by the Sherman Act. *Id.* at 501. The critical distinction in *Apex* was the Court's recognition that collective bargaining necessarily impacts upon the primary employer' competitive market position but that such action, standing alone, does not have an actual or intended effect upon price competition. *Id.* at 504. It is precisely this analysis which, when applied to the facts of

the instant proceeding, confirms the Respondent's culpability under the sanctions of the Sherman Act. This conclusion is best buttressed by the *Apex* Court's reliance upon the "secondary boycott" cases wherein union liability under the Sherman Act had been found (*e.g., Loewe* v. *Lawlor, supra; Duplex Printing Press Co.* v. *Deering, supra;* and *Bedford Cut Stone Co.* v. *Journeymen Stonecutters Association*, 274 U. S. 33 (1927)) as distinguished from a purely primary strike which did not have the requisite impact upon the product market.

d. United States v. Hutcheson; Labor Immunity Depends on Accommodation of Labor and Antitrust Laws.

The year following *Apex* the Court decided *United States* v. *Hutcheson*, 312 U. S. 219 (1941), which did not disturb the above-noted holding or dicta in *Apex*. *Hutcheson* involved a criminal prosecution in a peaceful jurisdictional dispute between two unions over a work assignment by Anheuser-Busch. The losing union organized a strike among employees of contractors erecting a building for Anheuser and organized a boycott of the company's beer. Although the boycott would have been a violation of the Sherman Act under earlier precedent, the Court held the union's activities to be lawful under the Sherman Act. The Court reasoned that "whether trade union conduct constitutes a violation of the Sherman Law is to be determined only by reading the Sherman Law and § 20 of the Clayton Act and the Norris-LaGuardia Act, 29 U. S. C. 101-115, as a harmonizing text of the outlawry of labor conduct". *Id.* at 231.

The Court concluded that the union's "peaceful" activities were protected from antitrust prosecution by Section 20 of the Clayton Act, *Id.* at 233. Specifically, the Court held that Congress overruled *Duplex* when it enacted the Norris-LaGuardia Act in 1932, insofar as *Duplex* interpreted Section 20 of the Clayton Act as inapplicable to secondary disputes. Justice Frankfurter reasoned that the Norris-LaGuardia Act, which removed federal court jurisdiction to enjoin a secondary boycott evidenced a congressional intent that a peaceful secondary

boycott could no longer be a criminal violation of the Sherman Act.

Hutcheson's abiding importance, however, is in the rationale used by the Court to conclude that secondary boycotts were exempt from the Sherman Act. The Court chose to interlace and harmonize often-conflicting congressional policies in the fields of antitrust and labor. The Court found that Congress had removed secondary boycotts from the injunctive powers of the federal courts by the enactment of the Norris-LaGuardia Act, and it would be illogcial to hold activity expressly protected by Norris-LaGuardia subject to Sherman. If the same rationale be applied to the present case, this Court must conclude the defendants' activities, which are today prohibited by the Taft-Hartley Act, are not protected by the national labor legislation and therefore not exempt from the Sherman Act.

Congress in 1947 outlawed the secondary boycott, partially in response to and to overrule the Supreme Court's dictum in *Allen-Bradley Co.* v. *Local Union No. 3, IBEW*, 325 U. S. 797, 809 (1945), that the union's hot cargo boycott, without employer complicity, would be legal under the Sherman Act. The Taft-Hartley Act prohibition of the secondary boycott rendered unlawful that which before had been protected.

The required analysis of accommodating antitrust and labor legislation, post 1947, requires a holding contrary to *Hutcheson* and certainly contrary to the *Allen-Bradley* dictum referred to above. Since secondary boycotts lost congressional protection in 1947, accommodation of the labor and antitrust laws is unnecessary as the conduct is illegal under both laws, and unions engaging in such conduct are subject to Sherman Act liability if the requisite restraint on competition and the product market be shown.

This Court has confirmed this analysis in *National Woodwork Manufacturers* v. *NLRB*, 386 U. S. 612 (1967),[7] where it re-

7. That case held the hot cargo sanctions wrought by the Landrum-Griffin Bill's addition of § 8(e) to the National Labor Relations Act of 1959 were to be interpreted as prohibiting agreements with secondary, but not primary, objectives.

viewed the legislative history of the Taft-Hartley Act, and quoted the following Conference Report:

> "Under clause (A) strikes or boycotts, or attempts to induce or encourage such action, were made unfair labor practices if the purpose was to force an employer or other person to cease using, selling, handling, transporting, or otherwise dealing in the products of another, or to cease doing business with any other person. Thus it was made an unfair labor practice for a union to engage in a strike against employer A for the purpose of forcing that employer to cease doing business with employer B. Similarly it would not be lawful for a union to boycott employer A because employer A uses or otherwise deals in the goods of, or does business with, employer B." 386 U. S. 631-2.

The Court concluded:

> "In effect Congress, in enacting § 8(b)(4)(A) of the Act, returned to the regime of *Duplex Printing Press Co.* and *Bedford Cut Stone Co., Id.*

Thus, as under *Duplex*, unions, acting alone conducting secondary boycotts prohibited under the labor law are not exempt from the proscriptions of the Sherman Act. That is, under *Duplex* and contrary to *Hutcheson*, union secondary conduct proscribed by the Taft-Hartley amendments is contrary to national labor relations policy. Moreover, as hereinafter discussed, Congress, by enacting the Landrum-Griffin amendments of 1959 (Pub. L. No. 257, 86th Cong. 1st Sess. 1959), reasserted the direction in labor policy taken in 1947, by taking greater measures to establish the invalidity of union secondary conduct under the NLRA.[8] Accordingly, union secondary conduct, proscribed by the national labor policy, is no longer exempt from the antitrust laws.

8. The 1959 amendments to the NLRA are discussed fully in Part B of the Chamber's brief herein.

B.

AS THE UNION CONDUCT HEREIN IS CONTRARY TO STATUTORILY DEFINED LABOR POLICY, IT CANNOT BE EXEMPT FROM THE SHERMAN ACT.

The Respondent Union herein urged, and the District Court below upheld the view, that the subcontractor's agreement at issue herein is lawful under the construction industry proviso to Section 8(e),[9] and that, accordingly, the agreement and the Union's conduct in exacting that agreement from Connell are consistent with national labor policy and are, therefore, sheltered from the antitrust laws. Accordingly, a full analysis of Section 8(e) and the nature and scope of the construction industry proviso, as set forth hereinafter, is required to show that such views are in error and that the proviso does not render the Union's conduct legitimate in terms of the exemption to the Sherman Act.

In 1959, Congress enacted Section 8(e) of the National Labor Relations Act to outlaw secondary agreements, commonly known as "hot cargo" clauses, which required employers to cease doing business with other persons with whom the union party to the agreement might have a labor dispute. However, Congress incorporated the proviso to Section 8(e) which permits "hot cargo" agreements with respect to job site work in the construction industry. This Court has never considered a case requiring the full delineation of this aspect of the Landrum-Griffin amendments, which, as the court below has indicated, is required for the orderly administration of the NLRA. (App. Pet. Cert. B 46, B 61-65)

As the Section 8(e) proviso constitutes an integral part of the statutory scheme governing collective bargaining, it is fundamental that the Act contemplates a bargaining relationship between parties who may permissibly enter into a hot cargo agreement. *Dallas Building and Construction Trades Council,*

9. 29 U. S. C. Sec. 158(e).

396 F. 2d 677 (D. C. Cir. 1968). Without that relationship the parties simply have no capacity, obligation or right under the National Labor Relations Act to contract with respect to labor relations, let alone the labor relations of some third party. Section 8(e) and its proviso was written into legislation which has as its synthesizing theme the promotion and regulation of collective bargaining. Sections 8(a)(5), 8(a)(2) and 8(b)(3)[10] make clear that the duty and right to bargain stem from the establishment by a union of its representation of a majority of the employer's employees in an appropriate unit. Indeed, much of the Act is concerned with protecting employees' rights from encroachment by illegitimate bargaining relationships. (*E.g.*, Sections 8(a)(2), 8(b)(1)(A), 8(b)(7) and 9(a).[11] Even Section 8(f), which permits pre-hire bargaining agreements in the construction industry, is narrowly limited to proscribe such agreements which infringe upon the rights of existing employees to authorize a bargaining relationship of their own choosing.

As a part of the Congressional design to adapt the bargaining process to various societal interests, Section 8(e) and the related secondary boycott provisions of the Act were enacted as a response to excesses *in collective bargaining*, pursuant to which disputes spread beyond a primary employer to embroil neutrals to the dispute. Specifically, as we show in Section 1) below, Congress enacted Section 8(e) to correct the "hot cargo" abuse that arose out of the growth of collective bargaining. Accordingly, in legislating the exemption applicable to the construction industry, Congress could hardly have intended to sanction such an agreement between parties who have no competence even to bargain collectively. Absent this prerequisite of a legitimate bargaining relationship between the parties to such a hot cargo clause, the proviso would be wrenched into a device for union organizational methods antithetical to Section 7 rights

10. 29 U. S. C. Secs. 158(a)(5), (a)(2), (b)(3).

11. 29 U. S. C. Secs. 158(a)(2), (b)(1)(A), (b)(7); 159(a).

of employees[12] and a means for achieving anticompetitive market restrictions without the justification of a legitimate bargaining interest. Such a result is incompatible with the overall design of the National Labor Relations Act, and cannot provide the basis for exemption from the Sherman Act.

1) The Construction Industry Proviso to Section 8(e) Does Not Exempt Agreements Between Parties Having No Mutual Bargaining Relationship.

While enacting in Section 8(e) a broad proscription against voluntary hot cargo agreements, Congress carved out an exception for agreements "between a labor organization and an employer in the construction industry" which relate to the subcontracting of work at the building site. Even this narrow exception which allowed agreements having a secondary object was premised on the need to protect the "pattern of collective bargaining" in this industry. (Volume II, Legislative History of the Labor-Management Reporting and Disclosure Act of 1959 at 1815). Collective bargaining furnished the touchstone for sanctioning secondary subcontractor's agreements which, by their definition, related to the union's objectives outside the primary bargaining unit. The Congressional rationale undergirding the proviso recognized that peculiar to the construction industry were special interests of the bargaining unit employees which justified an exception permitting voluntary agreements with secondary effects outside the unit. Nevertheless, it was clearly anticipated that these special interests would be advanced only by a union having the *right to bargain* for the employees directly affected.

In the building trades industry, employees of the different craft specialty contractors traditionally work together at a common situs. Because of this close relationship among employees

12. See the specific protections against imposed representation by a nonmajority union provided in Sections 8(a)(2), 8(b)(4)(C) and 8(b)(7) of the Act.

on the same site, and the potential created for disruption arising from incompatible interests, Congress recognized that trade unionists had a protectable interest in refusing to mingle with nonunion workers at a common work site. Accordingly, the proviso was "intended to be a measure designed to allow agreements pertaining to certain secondary activities of the construction site because of the close community of interests there . . .". *National Woodwork Manufacturers' Assn.* v. *N. L. R. B., supra,* 386 U. S. 612. Another expression of the rationale was given by the Third Circuit in *Essex County and Vicinity District Council of Carpenters* v. *N. L. R. B.,* 332 F. 2d 636 (1964):

> "This limited exemption [the proviso to Section 8(e)] was granted apparently in recognition of problems peculiar to the construction industry, particularly those resulting from sporadic work stoppages occasioned by the traditional refusal of craft unionists to work alongside nonunion men on the same project."[13]

Taking into account the continuity that the theme of collective bargaining gives to the different provisions of the Act, and the specific concern of Congress in the proviso to preserve bargaining patterns, Congress clearly intended the proviso as sanctioning an employee interest which was meant to be protected in the context of collective bargaining. As we show below (part b of this Section), the interest there sanctioned was not some institutional interest of construction unions in using restrictive site agreements as short-cut organizational devices to unionize sites or to acquire work already assigned to nonunion employees. Accordingly, the interest in site exclusivity protected by Section 8(e) proviso is that of the *employees.* The proviso contemplates that unions may protect such interest through "an

13. The same view of the proviso was taken by the Court of Appeals for the District of Columbia Circuit in *Drivers Local 695* v. *N. L. R. B.,* 361 F. 2d 547, 551 (1966), in stating:

> "The purpose of the Section 8(e) proviso was to alleviate the friction that may arise when union men work continuously alongside nonunion men on the same construction site."

agreement" with the "employer", and certainly the most natural vehicle for that purpose under the scheme of the Act is an established collective bargaining relationship, as Congress in fact contemplated.[14]

a. The Legislative History.

The legislative history of Section 8(e) illustrates that Congress intended a collective bargaining nexus between the employees having such legitimized interest in site exclusivity and the employer from whom a secondary site agreement is sought. Senator McNamara, in commenting on the construction industry proviso, stated:

> "The proviso permits plumbers and pipefitters local unions to bargain with *their* contractors relative to the contracting or subcontracting out of any fabrication of the pipe . . .". II. Leg. History of the Labor-Management and Disclosure Act of 1959, *supra,* at 1815. (Emphasis added.)

By the words, *"their contractors"*, Senator McNamara obviously meant plumbing and mechanical contractors who bargain with the unions representing their employees, and excluded from the application of the proviso a contractor who had no such bargaining relationship. Also, Congressman Frank Thompson,

14. The foregoing analysis does not depend on any distinction between primary and secondary objectives of the agreement sought and is consistent with the Board and court decisions holding that secondary site agreements are exempt in the construction industry. This analysis permits secondary site agreements, so long as they were between unions and employers having a *bona fide* collective bargaining relationship. For example, a contractor employing carpenters in the construction industry may agree with an A. F. L. union representing such employees that the laborers' work, or any and all other craft specialty work, shall be subcontracted only to those contractors employing A. F. L. union members. Such agreement would be secondary because it relates directly to labor relations elsewhere; also, it is exempt under the Section 8(e) proviso because it promotes the Congressionally recognized interest that the contractor's unionized employees have in site exclusivity. *National Woodwork Manufacturers Assn.* v. *N. L. R. B., supra,* 386 U. S. 612.

Jr., a member of the Conference Committee, in analyzing the proviso's effects upon prefabrication agreements in the construction industry, made the same point in stressing that the subject matter was one "to be covered by the collective bargaining agreement", and that the proviso permitted employees "to *bargain with their contractors* relative to the contracting or subcontracting out" of work.[15] (Emphasis added)

Moreover, in considering the proscriptions in the body of Section 8(e), Congress was concerned principally with the abuses of the collective bargaining process by which unions were able to obtain hot cargo clauses. From the proceedings on the floor, it is clear that Congress envisioned the bill to purge the collective bargaining process of attempts to obtain hot cargo provisions. Congressman Thompson of New Jersey and then-Senator John F. Kennedy of Massachusetts prepared a joint analysis of the pending bills, which summarized this concern as follows:

> "Some time after the Taft-Hartley Act became law the Teamsters Union began to exploit this distinction by the device of hot cargo clauses. *During negotiations with trucking firms, the Teamsters would demand that any*

15. The full context of Congressman Thompson's commentary is as follows:

> "Many building trade unions' officials advise me that there have been numerous questions submitted to them both by local union officers as well as contractors asking the question whether or not their particular subcontracting clauses in their existing agreements are covered by the proviso to section 8(e) of the new Labor Management Reporting and Disclosure Act of 1959. More particularly, the question has arisen by the Plumbers and Pipefitters International Union based on what is known as their fabricating clause.
>
> The proviso above set out embraces and covers all forms of contracting or subcontracting *in agreements between building and construction contractors and building trades unions* with respect to work to be done at the jobsite. The pipe installed on the jobsite must be cut, treated and fabricated prior to installation. This is done at jobsite in some jobs or at the shop of the employer, or may be subcontracted by the contractor.

> *collective bargaining agreement that he would not truck or require his employees to handle any freight which was hot or unfair because it came from an employer engaged in a labor dispute.*
>
> * * * * *
>
> "Unfortunately there are a good many cases in which the Teamsters, without any inducement of employees, is often able to persuade the secondary employer not to carry the goods and not to require his employees to handle them. *It is very hard for a trucking firm either to resist the Teamsters' demand for a hot cargo clause in collective bargaining, when the price of resistance would undoubtedly be a strike for still higher wages,* or to refuse to live up to the contract once it has signed it, when the cost of noncompliance would undoubtedly be the Teamsters' insistence that the contract had been terminated by the violation, *thus freeing the union to present new demands in collective bargaining.*
>
> * * * * *
>
> "Section 707 of the Senate bill sought to correct this by outlawing hot cargo clauses and making existing clauses unenforceable. The bill also makes *it an unfair labor practice for a union to request such a clause in collective bargaining.*"[16] (Emphasis added.)

This is all a question to be covered by the collective bargaining agreement.

The proviso permits plumbers and pipefitters local unions *to bargain with their contractors* relative to the contracting or subcontracting out of any fabrication of the pipe or the parties may agree that it may be done at the jobsite." II Leg. Hist. at 1816(2)(3). (Emphasis supplied)

To the same effects are the remarks of Senator McNamara, II Legislative History at 1815(2). The words "their contractors" obviously meant mechanical contractors who bargained with the unions representing their employees. By stressing the collective bargaining relationship and by carefully excluding from their explanation any broad reference to stranger contractors, these statements clearly show that the proviso did not apply to a union and contractor who had no right to enter upon a collective bargaining relationship.

16. Section 707 of S. 1555 would have made it a breach of good faith bargaining to request or negotiate for a hot cargo clause. However, when the bill emerged from the Conference Committee, the

Legislative History of the Labor-Management and Disclosure Act of 1959, at 1707-1708. See, also, *Id.* Vol. I, at 779; Vol. II at 1079 (2-3), 1197 (3), 1432, 1858 (1).

As the body of Section 8(e) was born out of concern for the subversion of the bargaining process, so Congress intended that the exception created in the construction industry with respect to agreements pertaining to site work would be an exemption permitted only in the context of collective bargaining. This requirement for a collective bargaining nexus accommodates both the interest of union employees in site exclusivity, as Congress intended, and the rights of unrepresented employees protected by the statutory scheme of voluntary collective bargaining. Congress never contemplated that secondary site agreements obtained outside of the context of an established bargaining relationship be used as a tool to exclude open shop contractors from the marketplace, or as a device to organize an entire industry from the top down.

b. The Statutory Scheme.

Only by restricting permissible site work agreements to those entered into between an employer and *a union representing his employees,* may the foregoing Congressional rationale be effectuated in a manner consistent with the statutory scheme of the NLRA. For, if construction trades unions are free to exact such exclusive site agreements from stranger contractors, whose employees may be nonunion, or when all employees concerned at the site may be nonunion, the Congressionally recognized interest in site exclusivity is not served in any legitimate fashion. Certainly, such contractor's employees are not well served as they have no interest whatsoever in exclusively reserving the

proviso had been pared, presumably because it was superflous. Nevertheless, this history illustrates that Section 8(e) was cast in a matrix of legislation designed to regulate the collective bargaining process, from which it follows that the construction industry proviso was designed to function singularly within the confines of the collective bargaining process.

site for the use of union workers. To the contrary, such exclusivity is antithetical to their own interests because the Section 7 rights of these employees and all other nonunion employees already at the site will be subverted by an arrangement which forces them to join the union as a condition to retaining their jobs or if the union chooses not to admit them to membership excludes them from the job site altogether.

A reading of the proviso to permit this result flies in the face of the stated policy of Section 1 of the NLRA, 29 U. S. C. 151, to "encourage . . . collective bargaining" by "protecting the exercise by workers of full freedom" to designate "representatives of their own choosing." To implement this policy, the various sections of the Act taken together regulate the establishment of the bargaining relationship and define the scope of the matters over which parties to such a legitimate bargaining relationship may be required to bargain. Thus, Section 8(a)(5) and Section 9 impose the duty to bargain only where employees select a union as their representative. Section 8(a)(2) and Section 8(b)(1)(A) prohibit bargaining by employers and unions where the employees have not freely selected the bargaining representative.[17] Section 8(b)(7) disallows coercive and other undesirable organizational methods, such as blackmail picketing where employees have selected another union, or where the employees have within the previous twelve months rejected union representation, or where the union's picketing exceeds a reasonable length of time. In the construction industry, Section 8(f) permits pre-hire agreements, but only with the limitations that preserve the employees' rights under Section 8(a)(2) against an unwanted union and which accord them a specific right, not subject to the usual contract bar rules, to a Labor Board election to oust the union.

This whole structure of the Act is directed toward preserving the integrity of the process by which the collective bargaining

17. *Int'l. Ladies' Garment Workers' Union* v. *N. L. R. B., (Bernard-Allman Texas Corp.),* 366 U. S. 731 (1961).

relationship is established, and toward defining the legal nexus for bargaining. In circumstances such as those here, where a union having no such legitimate bargaining relationship seeks a proviso agreement from a stranger, the whole structure and policy of the Act will be thwarted, if it may be done with impunity.

For, in effect, the Union is appropriating the Section 8(e) proviso as a statutory mandate to conduct organizational campaigns in the construction industry by an agreement with strangers which will insure the unionization of the sites affected by compelling the employees of all subcontractors there to become union members. Alternatively, it will deny work at such sites to the subcontractors' employees based upon their lack of union membership. Such a device procures this result by circumventing the whole panoply of statutory provisions protecting the employees' rights to freely select a bargaining representative of their own choosing. Moreover, it constitutes a method of imposing organization upon employees in a whole industry rather than unit by unit; and is a method of setting the terms and conditions of employment upon an industry-wide basis, rather than unit by unit. Such a construction of the proviso would wrench the proviso to Section 8(e) from its moorings in the statutory scheme of promoting free collective bargaining.

Only a construction of the proviso which requires the bargaining nexus as a justification for the union to assert its members' interest in site exclusivity will comport with the statutory scheme. Without some clearer legislative expression, it cannot be reasoned that Congress intended the Section 8(e) proviso to be read in a way that would subordinate the statutory rights of unrepresented employees or employees represented by a rival union to the institutional interests of a union in blatant work acquisition or in organizing from the top down. Such an anomaly may only be avoided by adopting a construction of the proviso which flows naturally from the language of Section

8(e), the legislative history and the Congressional rationale: that is, that the interest of union workers in site exclusivity may be vindicated only through an agreement where there is already existing a bargaining nexus between their union and their employer.[18]

Where no such nexus exists, an exclusive site agreement is not saved by the proviso, and more, it violates Section 8(e). As Congress did not intend to exempt from Section 8(e) secondary site agreements between *strangers* to collective bargaining, it follows that such agreements are prohibited by that section. Clearly, they represent the type of abuses that the proscriptive body of Section 8(e) interdicted.

As Congressman Griffin stated in the Floor debates when he urged acceptance of his amendment, now Section 8(e), "Our substitute would ban *all* hot cargo agreements" (Emphasis added). II Leg. History 1568. To the same effect, see II Leg. History 1518. Since the secondary site agreement herein does not fall within the narrow exception stated in the proviso to Section 8(e), therefore, due regard for the clear legislative intent compels the conclusion that it is within the class of *"all* hot cargo agreements" prohibited by the body of Section 8(e).

Accordingly, not only is the agreement herein outlawed by Section 8(e), but also the picketing by the Union to exact such an

18. Also, any broader rule would be incompatible with the secondary boycott statutes and would permit what was intended as a limited exception to Section 8(e), to swallow the rule of *N. L. R. B.* v. *Denver Building and Construction Trades Council*, 341 U. S. 675 (1951). Under the holding of that case, Section 8(b)(4)(B) prohibits economic coercion of the general contractor for the object of forcing him to exclude nonunion subcontractors from a construction site. Should exclusive site agreements between strangers to collective bargaining be permissible under Section 8(e), and picketing to obtain them be permitted under Section 8(b)(4)(A), the result disallowed in *Denver Building* could be lawfully achieved by indirection and that holding circumvented. There would be no limitation upon which contractors in the construction industry could prevent such results, and a union could permissibly picket for that end. The complete evisceration of *Denver Building* in this manner is wholly inconsistent with the express view of Congress that in amending the secondary boycott statutes by adding Sections 8(e) and 8(b)(4)(A) it was closing loopholes rather than opening new ones.

agreement from Connell is proscribed by Section 8(b)(4)(A) of the Act. That provision interdicts picketing of

> "any person engaged in commerce or in an industry affecting commerce, where . . . an object thereof is:
>
> > "(A) forcing or requiring any employer . . . to enter into any agreement which is prohibited by section 8(e)."

Therefore, as the foregoing analysis demonstrates, the Union errs in its contention that both the site agreement with a stranger to collective bargaining and its conduct to obtain such agreement were privileged under the labor statutes. The showing herein that such conduct indeed violated the NLRA, deprives the Union of any reliance upon the labor statutes as a basis for asserting a Clayton Act exemption.

2) In Addition, the Proviso to Section 8(e) Exempts Only Exclusive Site Agreements Which Are Voluntary: Consequently, Section 8(b)(4)(A) Prohibits Picketing to Obtain Such Agreements in the Construction Industry.

The foregoing section of this brief demonstrated that Respondent Union's picketing to secure a hot cargo contract from an employer with whom no collective bargaining relationship existed constituted proscribed and unlawful conduct beyond the scope of a union's legitimate endeavor. That argument focused on the absence of the required bargaining relationship. Independent of that consideration, however, the Union's conduct is otherwise unlawful and illegitimate. Even without regard to the absence of a collective bargaining relationship, the Union's picketing to obtain a site agreement is banned by Section 8(b)(4)(A) of the NLRA. (And for still different reasons, explicated in part 3, *infra*, the same conduct also violates Section 8(b)(4)(B).) For this additional reason, the Union's coercion of Connell to obtain an agreement restricting competition, falls outside the carefully drawn parameters of national

labor policy marked out by the labor statutes, and accordingly such conduct is not antitrust exempt.

Sections 8(e) and 8(b)(4)(A), prohibiting voluntary hot cargo agreements and union coercion to obtain such agreements, were part of the 1959 amendments Congress enacted to close loopholes in the existing secondary boycott statutes. The specific situation to which Sections 8(e) and 8(b)(4)(A) were addressed was the *Sand Door*[19] case, in which the Court indicated that while picketing to enforce a hot cargo agreement was unlawful, such an agreement voluntarily entered into was not proscribed. In response thereto Congress passed Section 8(e) which outlawed such voluntary agreements generally.

However, Congress made an exception in the construction industry. It included in Section 8(e) a proviso which exempted such agreements relating to work to be performed at a construction site, as per *Sand Door*, so long as they were entered into voluntarily. The committee reports and the explanations given in the floor debates of the construction industry proviso uniformly demonstrate that the proviso was intended to preserve in that industry the status of the law existing prior to 1959, which sanctioned only voluntary agreements. In this regard, the House Report on the Conference proceedings explained:

> "The committee of conference does not intend that this proviso should be construed so as to change the present state of the law with respect to the validity of this specific type of agreement relating to work to be done at the site of the construction project or to remove the limitations which the present law imposes with respect to such agreements. Picketing to enforce such contracts would be illegal under the *Sand Door* case (*Local 1796, United Brotherhood of Carpenters* v. *N. L. R. B.*, 357 U. S. 93 (1958)). To the extent that such agreements are legal today under section 8(b)(4) of the National Labor Relations Act, as amended, the proviso would prevent such legality from being affected by section 8(e). The proviso

19. *United Brotherhood of Carpenters* v. *N. L. R. B.*, 357 U. S. 93 (1958).

applies only to section 8(e) and therefore leaves unaffected the law developed under section 8(b)(4). * * * The proviso is not intended to limit, change, or modify the present state of the law with respect to picketing at the site of a construction project.

* * * * *

It is not intended that the proviso change the existing law with respect to judicial enforcement of these contracts or with respect to the legality of a strike to obtain such a contract."

H. Rep. No. 1147 on S. 1555, pp. 39-40, I Leg. Hist. 942-943; See, also, Sen. Kennedy's remarks, II Leg. Hist., p. 1433.

Analysis of the then existing law, of which Congress must be presumed to be aware and which it disclaimed any purpose to change, conclusively supports the proposition that Congress intended to prohibit the use of coercion to secure subcontractors' agreements such as are involved herein. Prior to 1959, picketing of any person to obtain a hot cargo agreement violated Section 8(b)(4)(A), now Section 8(b)(4)(B). It was held that the effect of such an agreement was a proscribed "cease doing business" object under that statute. *Bricklayers, Masons and Plasterers International Union of America, AFL-CIO (Selby-Battersby & Co.)*, 125 NLRB 1179 (1959). See, also, *Texas Industries, Inc.*, 112 NLRB 923 (1955), *enf'd.*, 234 F. 2d 296 (CA 5, 1956); *Bangor Bldg. Trades Council*, 123 NLRB 484 (1959), *enf'd.*, 278 F. 2d 287 (CA 1, 1960). Indeed, the rationale and holding of *Sand Door* logically led to that result; or as the N. L. R. B. said, in construing the pre-1959 law: "That proposition seems implicit in the legal analysis provided by the Supreme Court in its *Sand Door* opinion."[20] In holding that picketing to force a cessation of business between employers was not saved by the existence of a hot cargo agreement, the Court in *Sand Door* was concerned that the

20. *Local 383, Construction, Production and Maintenance Laborers (Colson and Stevens Construction Co., Inc.)*, 137 NLRB 1650, 1651 (1962), *enf'ment. denied*, 323 F. 2d 422 (C. A. 9, 1963).

neutral employer retain his freedom of choice with respect to participating in a secondary boycott to which he had contractually agreed at an earlier time. The Court stressed the consideration that:[21]

". . . the contractual provision itself may well not have been the result of choice on the employer's part free from the kind of coercion Congress has condemned. It may have been forced upon him by strikes that, if used to bring about a boycott when the union is engaged in a dispute with some primary employer, would clearly be prohibited by the Act. Thus, to allow the union to invoke the provision to justify conduct that in the absence of such a provision would be a violation of the statute might give it the means to transmit to the moment of boycott, through the contract, the very pressures from which Congress has determined to relieve secondary employers."

From this it follows that if transmitting proscribed pressures through the contractual provisions to the moment of boycott were prohibited, those same pressures, when applied at the inception of the contract, must likewise be proscribed by the statute. For otherwise, the initial coercion to obtain a general agreement to boycott others may be effectively transmitted to the moment, at a later date, when the employer honors this agreement and the very result Congress intended to prohibit will be realized through circumvention. In short, seeking an agreement to boycott others in the future was an object proscribed by Section 8(b)(4)(A) prior to 1959. By adopting the pre-existing law, Congress exempted only *voluntary* agreements in the construction industry.

That such was precisely the intent of Congress is further supported by the authoritative remarks of Congressman Barden, Chairman of the House Labor Committee and a member of the Conference Committee. In presenting the Conference Report to the House, Congressman Barden explained:

21. *Sand Door, supra*, 357 U. S. at 101.

> "The first proviso under subsection (e) of section 704 permits the making of *voluntary* agreements between a labor organization and an employer in the construction industry relating to the contracting or subcontracting of work to be done directly on the site of construction." II Leg. History 1715. (Emphasis supplied.)

Accordingly, the present Section 8(b)(4)(A) must be read as condemning picketing in which the object is to obtain the kind of clause dealt with by Section 8(e).

Although initially the NLRB held, in accordance with the above analysis, that the proviso to Section 8(e) did not save picketing to obtain such an agreement from the prohibition of Section 8(b)(4)(A), the subsequent reversal by the Board of its views effectively pretermitted consideration of the question by this Court. On first impression, the Board in *Local 383, Construction, Production & Maintenance Laborers Union (Colson and Stevens Construction Co.)*, 137 NLRB 1650 (1961), held such conduct prohibited, based upon the clearly expressed legislative intent to preserve the pre-1959 status of the law in the construction industry. However, three appellate courts disagreed and held that literally construed, Section 8(b)(4)(A) only barred picketing to obtain an agreement which violated Section 8(e), and since the proviso exempted such agreements in the construction industry from Section 8(e), Section 8(b)(4)(A) did not apply.[22] Thereupon, the Board reversed its earlier *Colson and Stevens* decision and acquiesced in the contrary view. *Northwestern Indiana Building and Construction Trades Council (Centlivre Village Apartments)*, 148 NLRB 854, *enforcement den.*, on other grounds, 352 F. 2d 606 (C. A. D. C., 1965).

22. *Construction, Production & Maintenance Laborers Union, Local 383, et al.* v. *N. L. R. B. (Colson and Stevens Construction Co.)*, 323 F. 2d 422 (CA 9, 1963); *Essex County and Vicinity District Council of Carpenters and Millwrights, United Brotherhood of Carpenters, etc. (Associated Contractors of Essex County, Inc.)* v. *N. L. R. B.*, 332 F. 2d 636 (CA 3, 1964); *Orange Belt District Council of Painters No. 48, AFL-CIO, et al. (Calhoun Drywall Co.)* v. *N. L. R. B.*, 328 F. 2d 534 (CA DC, 1964).

As a result, no other court of appeals was called upon to review the issue, and nearly all avenues for obtaining this Court's consideration of the matter were effectively foreclosed. As noted in the opinions below (App. Pet. Cert. B.-46, B.-60) the General Counsel, who has final authority with respect to issuing complaints, believes himself bound by the Board's *Centlivre* holding and will not institute proceedings based upon such picketing as occurred here. Consequently, as the likelihood is quite remote that this issue will again come before the Court, it ought to use this opportunity to address the issue of whether the proviso sanctions only site agreements which are entered into voluntarily.

The court below vainly admonished the Board's General Counsel to seek a Board disposition of the precise issue here, concerning the legality under the proviso of picketing to obtain a hot cargo agreement from a stranger contractor. (App. Pet. Cert. B. 46.) For, as both the court and the dissent below agreed, the question has an important impact upon labor relations in the construction industry. (App. Pet. Cert. B. 46, 61-65.) Of equal significance to the industry is the scope of Section 8(b)(4)(A) in relationship to the Section 8(e) proviso. The Court should speak to that question and, overruling the Board's *Centlivre* decision, implement the legislative intent to authorize only voluntary agreements between parties having a collective bargaining relationship.

For the reasons that there were neither a voluntary agreement here nor, as urged in Section B, 1) *supra*, a collective bargaining relationship, the Union's conduct violated the NLRA, and was not conduct sanctioned by the Landrum-Griffin amendments. Accordingly, the Union has no basis under the Labor Relations Act for the formulation of any theory of exemption from the antitrust laws.

3) Even Under the Analysis Suggested by the Court Below That the Union Violated Section 8(b)(4)(B) Rather Than Section 8(e), Its Conduct Was Not Antitrust Exempt.

In the majority opinion below, the court suggested that at the very least, the coercion directed at exacting from Connell an agreement boycotting all area contractors who did not recognize the union or its affiliates, might well constitute a secondary boycott in violation of Section 8(b)(4)(B) of the Act. (App. Pet. for Cert. B.-39 to B.-45.) Such a characterization of the Union's conduct would comport with *Shelby-Battersby*,[23] and the rationale of *Sand Door* as discussed in Section B, 1) above. *Supra*, pp. 30-31. Such an analysis leads again to the conclusion urged here, that labor policy expressed through the labor statutes affords the Union's conduct no shelter from its antitrust consequences.

In summary, the thesis of the opinion below is that Section 8(e) does not at all regulate hot cargo agreements in which one party is not the immediate "employer" of employees represented by the union. Although the contractor in such an instance is not an "employer" within the meaning of Section 8(e), he is a "person" protected by Section 8(b)(4)(B), such that if the union pickets to require him to agree to "cease doing business" with others, it violates Section 8(b)(4)(B) of the Act.

Thus, as the court below reasoned, the proviso to Section 8(e) exempts only "an agreement between a labor organization and an *employer*." (Emphasis supplied.) The term "employer", as used in the statute, refers to the immediate employer of those employees represented by the union seeking the agreement. Therefore, still according to the lower court, the construction industry proviso does not apply to persons such as Connell who have no workers that the union represents. On the other hand, neither does the proscriptive portion of Section

23. *Bricklayers, Masons and Plasterers International Union of America, AFL-CIO (Selby-Battersby & Co.), supra*, 125 NLRB 1179.

8(e) apply because it contains the same term, "employer" and prohibits only an agreement with such an "employer". The result suggested below, therefore, is that read together Section 8(e) and the construction industry exemption neither prohibit nor permit such agreements. Section 8(e) simply does not govern. Therefore, Section 8(b)(4)(A), which regulates picketing to obtain "any agreement which is prohibited by Section 8(e)", is inapplicable as well.

However, since the object of the Union's picketing to obtain such an agreement is clearly secondary, it may be fairly inferred the Congress did not intend such conduct to go wholly unregulated. Indeed, that conduct falls precisely within the proscription of Section 8(b)(4)(B). See *Centlivre, supra*. That section prohibits economic coercion of "any person" with an object of forcing or requiring such person to cease doing business with any other party. Clearly, Connell falls within the broad definition of "any person". Moreover, the union's object in seeking a subcontractor's clause was to force Connell to cease doing business with others. Indeed, the secondary effect of such an agreement is broader and more pernicious than picketing to disrupt a business relationship with a single subcontractor. The Board has so held. *Bricklayers, Masons and Plasterers International Union (Selby-Battersby & Co.)*, 125 NLRB No. 115, 45 LRRM 1233 (1959). See *Sand Door, supra*, 357 U. S. 93, and the analysis of the rationale of that case as applied to picketing to obtain a hot cargo agreement, *supra*, at pp. 30-31.

Therefore, whether the Union's conduct here is characterized as unlawful under Section 8(b)(4)(B), Section 8(b)(4)(A), or Section 8(e), or all of them, it is clear that no element of statutory labor policy sanctions its direct and widespread anticompetitive effect upon the product market. Where, as here, the Union's conduct is not protected by the labor statutes, and indeed is specifically interdicted, it does not qualify as furthering legitimate union interest as defined by national labor policy. It is not antitrust exempt.

C.

THE UNION'S SECONDARY CONDUCT HEREIN, PROSCRIBED BY THE NATIONAL LABOR RELATIONS ACT, AS AMENDED, HAS A SUBSTANTIAL EFFECT OF RESTRAINING THE PRODUCT MARKET AND VIOLATES THE SHERMAN ACT.

The preceding sections have demonstrated that the Union's conduct herein is in violation of the interdictions of the Labor Act, is therefore contrary to the national labor policy, and results in the Union's forfeiture of its exemption from the Sherman Act. Under such circumstances, as *Jewel Tea, supra,* teaches, the Union, acting alone, can violate Sherman if its actions restrain trade for the derivative benefit of a favored employer class (as shown in the Introduction to this brief as well as in this section, *infra*) and such action has a significant and deleterious effect on free competition in a fashion proscribed by the antitrust law. With regard to this latter consideration, this Court has historically analyzed the market effects of union conduct in order to determine whether or not an antitrust violation exists.

Thus, Mr. Justice Stone, speaking for the Court in *Apex*, examined the market effects in both *Coronado* cases and *Heckert*,[24] and concluded that a substantive Sherman Act violation lies where a union's activities are "directed at control of the market" and are "so widespread as substantially to affect it." *Apex, supra,* at 506.

Mr. Justice Stone applied the "rule of reason" historically applied in both labor and nonlabor cases brought under the Sherman Act. He reasoned that union activities of a purely "local" nature in terms of their breadth and effect, though not immunized from antitrust proscription, are not violations of the

24. *United Mine Workers* v. *Coronado Co., (Coronado I),* 259 U. S. 344 (1922); *United Mine Workers* v. *Coronado Co., (Coronado II),* 268 U. S. 295 (1925); *United Leather Workers* v. *Heckert,* 305 U. S. 457 (1924).

Sherman Act because of their minimal control of and impact upon the market,[25] but union conduct which has a substantial effect upon the market or "otherwise to deprive purchasers or consumers of the advantages which they derive from free competition" violates the Sherman Act. *Apex, supra,* at 501.

Thus, a work jurisdictional dispute wherein a building trades union pickets to obtain work previously assigned to a different trade union, though a secondary boycott proscribed by the NLRA under Section 8(b)(4)(D), is confined to the immediate parties to the dispute. While such a dispute involves the rights and interests of those parties and the immediate job site, its effect on the industry and the market is minimal. It is local.

Similarly, where a union has a dispute with a single subcontractor and pickets a job site to bring pressure to bear on a neutral general contractor in order to gain concessions or an agreement from the subcontractor, while the union's conduct violates Section 8(b)(4)(B) of the NLRA, the dispute, by its very nature, is "local", affecting only the rights and interests of those persons or parties embroiled in the dispute. The overall effect of such a dispute on the competitive market, in terms of trade, restraint and destruction of competition, are insubstantial compared with the effect of the Union's conduct herein.

Here, by design, the Union effectively controls the business relationships between general contractors and mechanical subcontractors for the entire Dallas area construction industry. By the device of the subcontractors' agreement, the Union has excluded all open shop contractors and contractors having labor agreements with other unions from the marketplace. Further, this device enables the Union to allocate the available market to members of the local contractors' association or to any contractor whom it chooses, to the exclusion of all others. The Union is under no obligation to sign a collective bargaining agreement with an employer unless the Union represents a

25. *Apex, supra,* at 512.

majority of his employees, and no provision in the Labor Act compels or requires the Union to accept new members.[26] Therefore, the Union may simply refuse to offer the standard area agreement to the mechanical contractors whom it does not favor, offer it to those it does, and thereby allocate the available market.

Applying Mr. Justice Stone's analysis to the effects of the "local" type of secondary dispute, the restriction upon free competition is isolated and slight. In the instant case, however, the inescapable effect of the Union's design results in a substantial restraint of competition. Indeed, as the record below discloses, the Union's design herein effectuates total control and complete concentration of economic power in its own hands *to the benefit of those contractors it prefers* and deprives the consumer and purchaser of the advantages of free trade.[27] Such conduct constitutes, in the words of *Jewel Tea*, "an effort by the unions to protect one group of employers from competition by another, which is conduct that is not exempt from the Sherman Act." (381 U. S. at 693)

The Respondent has set upon a course which substantially restrains the economic freedom of the marketplace in the nation's largest industry. Moreover, as has been shown, it has

26. Section 8(b)(1)(A) of the NLRA permits unions to prescribe their own rules for the acquisition and retention of membership. Thus, a union is under no obligation to accept new members and does not violate the NLRA by its refusal to do so.

27. The Union has never contended that its conduct herein does not have this anticompetitive effect. Rather, its argument is that the Labor Act displaces the Sherman Act as the exclusive body of substantive law under which the consuming public's interest in a free and competitive marketplace should be protected and the Union's conduct regulated. In effect, the Union's argument for displacement amounts to no more than the argument for exclusive regulation under the NLRA which was conclusively rejected in *Jewel*.

In *Jewel*, one of the questions considered by the Court was:

> "Whether a claimed violation of the Sherman Antitrust Act which falls within the regulatory scope of the National Labor Relations Act is within the exclusive primary jurisdiction of the National Labor Relations Board." 381 U. S. at 684.

concentrated this economic power and control in the hands of a few and has done so contrary to the national labor policy. The ramifications of approving such activity, in terms of the effect that this Court's approval would have on the competitive economic system and the beneficient advantages that the public as a whole derives from that system, are manifest. If this Court should permit one local union, as is Respondent herein, to exercise such potential control of the market in one area of the country, then certainly large national construction trade unions would be permitted to exercise control of the entire construction marketplace throughout the whole nation by the same devices. The Chamber submits that such unfortunate results, contrary to both labor and artitrust policies, should be avoided by this Court.

The Court flatly rejected the notion, raised again herein that conduct within the regulatory scope of the NLRA would not be a violation of the Sherman Act. *Id.*, at 686-7.

Although *Jewel* and *United Mine Workers* v. *Pennington*, 381 U. S. 657 (1965) have engendered wide scholarly debate and disagreement, the commentators are in agreement with the Court in the respect that union conduct, if violative of the antitrust laws, should, as before *Jewel*, continue to be regulated under the Sherman Act. *E.g.*, DiCola, *Labor Antitrust: Pennington, Jewel Tea and Subsequent Meandering*, 33 U. Pitt. L. Rev. 705, 725 (1972); Meltzer, *Labor Unions, Collective Bargaining and the Antitrust Laws*, 33 U. Chi. L. Rev. 659, 696-701 (1972).

CONCLUSION.

For the reasons stated herein, together with those contended by the Petitioner, the Court is respectfully urged to reverse the court below.

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IN THE

Supreme Court of the United States

OCTOBER TERM—1973

No. 73-1256

CONNELL CONSTRUCTION COMPANY, INC.,

Petitioner,

vs.

PLUMBERS AND STEAMFITTERS LOCAL UNION NO. 100, etc.,

Respondent.

BRIEF ON BEHALF OF ASSOCIATED GENERAL CONTRACTORS OF AMERICA, BUILDING CHAPTERS OF THE ASSOCIATED GENERAL CONTRACTORS OF TEXAS AND NATIONAL ASSOCIATION OF HOME BUILDERS AS *AMICI CURIAE*

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IN THE

Supreme Court of the United States

OCTOBER TERM—1973

No. 73-1256

CONNELL CONSTRUCTION COMPANY, INC.,

Petitioner,

v.

PLUMBERS AND STEAMFITTERS LOCAL UNION NO. 100, *etc.*,

Respondent.

BRIEF ON BEHALF OF ASSOCIATED GENERAL CONTRACTORS OF AMERICA, BUILDING CHAPTERS OF THE ASSOCIATED GENERAL CONTRACTORS OF TEXAS AND NATIONAL ASSOCIATION OF HOME BUILDERS AS *AMICI CURIAE*

Introduction

This brief on behalf of Associated General Contractors of America, Associated General Contractors of Texas and the National Association of Home Builders, as *amici curiae*, is filed pursuant to written consent of the parties under Rule 42(2) of this Court. It is in support of the petitioner, Connell Construction Co., Inc.

Interest of *Amici*

The Associated General Contractors of America (AGC herein) represents approximately 9,500 union and non-union general contractors throughout the United States. In addition, AGC has some 75,000 union and non-union associate members who are non-general contractors in

the mechanical, electrical and other specialized fields of construction. AGC's members engage in all forms of construction; highways, roads, bridges, dams, airports, power plants, refineries, public projects at all levels of government, as well as private commercial, institutional, and industrial buildings of all types. It is the largest organization of its kind representing employers in the construction industry. At least 75% of the general construction contracts in the nation are performed by AGC members.

The Building Chapters of the Associated General Contractors of Texas are affiliated with the national AGC. Connell Construction Company, Inc. is a member of that association, the membership of which will be vitally affected by the outcome of this litigation.

The National Association of Home Builders is a national trade association of over 51,000 members with 481 state and local chapters in each of the fifty states, Puerto Rico and the Virgin Islands. It is the largest association of its kind in the nation representing employers in the home building industry.

In the year 1973, total construction expenditures in the United States equalled 135.1 billion dollars. Private residential construction amounted to 57.7 billion and private non residential construction 45 billion dollars. Public utilities alone expended over 15.2 billions. In all, over 10.5% of the Total Gross National Product was attributable to construction. Despite the imposition of wage controls, construction costs rose over 9% in 1973, the largest rise in the post World War II period. During the same year the industry was responsible directly or indirectly for the livelihood of one out of seven persons employed in the United States.

The issues raised by this case will have a tremendous impact upon the industry if such pervasive antitrust product and employer boycott agreements of the kind here involved are allowed to proliferate. The effect upon

construction costs will be staggering, placing greater pressure upon an already dangerously inflated economy. Consequently, the interest of the *amici* is both vital and immediate.[1]

Summary of Argument

The issues presented by this case bring into focus the dichotomy between the nation's antitrust laws and its national labor policy, a subject to which the Court has not addressed its attention since 1965. In 1965 the Court issued its decisions in *United Mine Workers* v. *Pennington*, 381 U. S. 657, and *Local 189 Amalgamated Meat Cutters* v. *Jewel Tea Co.*, 381 U. S. 676, seeking to harmonize the duality of the national interest in the prevention of illegal restraints of trade and the legitimate pursuits of labor in the protection of those it represents.

This case constitutes an attempt by labor to obtain an agreement in restraint of trade completely outside of the collective bargaining framework and from an employer who employs no employees represented by the Union. Indeed it has extracted from that employer, Connell, a general contractor, a coerced agreement whereby Connell has agreed to boycott and refrain from contracting with any employer-subcontractor with whom the Union does not have a collective bargaining contract. For its part, the Union has declared that it will not enter into any arrangement or understanding with any other employer which provides for any more favorable wages or other conditions than those stipulated in the agreement with Connell.

Upon these facts the Fifth Circuit erroneously concluded that a conspiracy or combination in restraint of trade did not exist and refused to consider whether such an agreement is lawful under the National Labor Relations Act (herein NLRA or the Act),[2] even though the

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[1] Source of statistics: *Construction Review*, Vol. 20, No. 3, April 1974, U. S. Department of Commerce.

[2] 49 Stat. 449 as amended by 61 Stat. 136 and 73 Stat. 519, 29 U.S.C. §141 et seq.

resolution of that issue would have aided in its determination of whether or not the Union had violated federal and/or state antitrust laws.

Amici, in support of the petitioner, contend that this agreement represents a conspiracy or combination in restraint of trade between labor and nonlabor forces such as condemned in *Pennington* and that it does not survive the "legitimate union interest" test established by *Jewel Tea* because: 1) it does not arise within the framework of collective bargaining, and 2) it is a secondary "hot cargo" agreement in clear violation of Section 8(e) of the Act.

In essence, the principles of *Carpenters Local 1976* v. *NLRB (Sand Door),* 357 U. S. 93 (1958), and other pre 1959 authorities were not disturbed and construction industry unions gained no greater rights by the enactment of the proviso to Section 8(e) in 1959 than they possessed prior thereto. What was unlawful then is unlawful now. Therefore, the conduct here involved being outside of the protection of the construction industry proviso to Section 8(e), violates the secondary boycott prohibitions of the Act, loses its shield and is exposed to the sanctions of the Sherman Antitrust Act.

In support of the premise that the activity of the Union is not protected by the construction industry proviso to Section 8(e)[3] *Amici* call attention to the total legislative scheme of the NLRA, the primary purpose of which is to encourage free collective bargaining subject to the legitimate rights of the parties and the public. Most importantly, this policy protects the guaranteed Section 7[4] rights of employees in their right to self-organization and designation of representatives *of their own choosing.* Thus, Section 9[5] ofthe Act provides for secret ballot representation elections in the unit affected; Section 8(a)(5)[6]

[3] 29 U.S.C. §158(e).
[4] 29 U.S.C. §157.
[5] 29 U.S.C. §159.
[6] 29 U.S.C. §158(a)(5).

and Section 8(b)(3)[7] require good faith bargaining with respect to the terms and conditions of employment for that unit; Section 8(b)(7)[8] prohibits picketing that conflicts with these provisions; and Section 8(f)[9], in the absence of any employees, only permits voluntary prehire agreements in the construction industry. Because of Section 8(b)(7)(A)[10] a stranger union cannot interfere in any way with an existing bargaining relationship or force execution of a contract where there are no employees, irrespective of the proviso to Section 8(e). Thus, if this conduct which is clearly secondary is not saved by the proviso, perforce, it violates Sections 8(b)(4)(A), (B)[11] and 8(e). Clearly, the legislative history of the construction industry proviso to Section 8 (e) makes it obvious that a "hot cargo" clause otherwise permitted by the proviso may not be coercively obtained. The National Labor Relations Board (herein the Board) was unanimously of that view until 1964 when, in complete disregard of the legislative history and other controlling precedent, it reversed its original well-reasoned and well-founded opinion.

The factual setting here presented raises an issue of critical importance to the construction industry, its employees, and the public which it serves. To permit the agreement extracted from Connell to stand would run counter to the entire fabric of the NLRA and sanction a conspiracy or combination in restraint of trade. Clearly, the decision below departs from the principles enunciated by this Court in prior antitrust and labor law precedents of long standing. The far reaching issues now before the Court, concerning as they do the largest industry in the nation, are of enormous impact on our economy and urgently require the further definitive teachings of this Court.

[7] 29 U.S.C. §158(b)(3).
[8] 29 U.S.C. §158(b)(7).
[9] 29 U.S.C. §158(f).
[10] 29 U.S.C. §158(b)(7)(A).
[11] 29 U.S.C. §§158 (b)(4)(A) and (B).

Introduction

The Issues and the Effects of the Decision of the Court of Appeals

The issues herein are of transcendent significance to the many thousands of employers and millions of employees engaged in the construction industry, to builders, owners and the public.

The court below characterized these issues as ". . . extremely important to the delicate balance of labor-management power in the construction industry and national labor policy pertaining thereto." *Connell Constr. Co.* v. *Plumbers & Steamfitters Local 100*, 483 F. 2d 1154, 1157 (5th Cir. 1973).

This Court's decision will determine:

(1) Whether a union, through economic coercion may compel neutral employers in the construction industry, with whom it neither has nor desires a collective bargaining relationship, to agree to boycott and cease contracting with any employer-subcontractor with whom the union does not have a collective bargaining contract.

(2) Whether such a union may impose a broad and unlimited employer boycott in the absence of any basis for a bargaining relationship.

(3) Whether owners, contractors, suppliers, manufacturers and other employers who perform some degree of construction work on and off site may continue to contract to do business with each other on a competitive basis.

(4) Whether an agreement of the kind in issue herein, and the economic coercion to obtain it are lawful under the construction industry proviso to Section 8(e) of the Act.

(5) Whether an agreement, such as that in issue herein, if unlawful under the proviso to Section 8 (e) can nonetheless be a legitimate union interest under federal and/or state antitrust laws.

(6) Whether vast new exceptions have been carved out of our federal antitrust laws.

(7) Whether state antitrust laws are pre-empted by federal labor laws.

(8) Whether federal courts have jurisdiction to render decisions in antitrust cases where such decisions require the interpretation or application of federal labor statutes, or whether the doctrine of primary jurisdiction requires such questions to be decided initially by the National Labor Relations Board.

(9) Whether, by enactment of the construction industry proviso to Section 8(e) the millions of employees who derive their livelihood from construction work have been stripped of the same basic freedoms and rights guaranteed to other employees under the Act.

The majority opinion below stated:

"We feel quite strongly that the Board should take and consider this issue fully at the next available opportunity. Its resolution will have significant impact on labor relations in the construction industry. Repeated attempts by an administrative body to avoid resolution of a difficult issue may constitute an abuse of discretion. See *Templeton* v. *Dixie Color Printing*, 5 Cir. 1971, 444 F. 2d 1064." (Pet. App. B-46, 47).[12]

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[12] All references to Pet. App. refer to the Appendix of Petitioner's Petition for Writ of Certiorari to the U. S. Court of Appeals for the Fifth Circuit.

Despite this mandate from the majority and the ringing dissent of Judge Clark, which fully supports the position of petitioner on both labor law and antitrust issues, the Board's General Counsel, after some twenty months of consideration, could not find reasonable cause to warrant the issuance of complaints in cases involving identical or substantially identical subcontractor agreements. As a matter of fact, he dismissed these cases subsequent to the filing of the petition for a writ of certiorari herein but prior to the granting thereof.[13] Moreover, subsequent to the dismissal of these cases, application to the General Counsel for further consideration in light of this Court's granting of a writ of certiorari has again met with refusal to either reconsider or issue complaints.

As hereinafter shown, and for reasons so ably set forth in the dissent by Judge Clark below, the conclusion is inescapable that the majority decision of the Fifth Circuit renders much of the Act a nullity and distorts its provisions and general scheme beyond recognition. In so doing, the decision of the court below ushers in the basis for a union claim that it is pursuing a "legitimate union interest" when, in fact, it is pursuing an object which is specifically prohibited by the Act and, thus, an interest which is quite illegitimate not only under our labor law but under our federal and Texas antitrust statutes as well.

[13] *Ponsford Bros.*, N.L.R.B. Case Nos. 28-CC-417 and 28-CE-12; *Hagler Construction Co.*, N.L.R.B. Case No. 10-CC-447; *Howard U. Freeman, Inc.*, N.L.R.B. Case No. 16-CC-477; and *Columbus Building Trades Council*, N.L.R.B. Case No. 9-CC-706 (1-20).

POINT I

The agreement in issue gives rise to a pervasive employer and product boycott in restraint of trade in violation of antitrust laws and in violation of the National Labor Relations Act.

a. The Union's Control of the Market Place.

This Court in *Allen Bradley Co.* v. *Local 3, IBEW*, 325 U. S. 797 (1945), found that a boycott of electrical products in New York City violated the Sherman Act. Here, the Court is confronted with much more than a mere product boycott because the subcontractor agreement in issue includes a product boycott in its all pervasive employer boycott. This is true because of the manner in which contracts are let in the construction industry. Historically, labor in the construction industry has not been covered by a separate contract; rather it has been included as a part of the entire contract. The cost of the mechanical contract is generally a very substantial percentage of the total cost of the entire project and, depending upon the type of project, frequently amounts to between 40% and 60% of total construction costs. On larger projects, such as power plants and refineries, the cost of the mechanical equipment, products and supplies covered by the mechanical contract can run into many millions of dollars.

Accordingly, subcontractors, specialty contractors, manufacturers, suppliers and others sell products, services and labor by a single contract to a general contractor who generally has responsibility for the entire job. Thus, if a given subcontractor, lacking the required contract with the union, is excluded because he is not part of the preferred class, both his product (prefabricated or otherwise) as well as his labor is excluded from the market place.[14] The

[14] Any inclusion of a product boycott in this all pervasive employer boycott clearly runs counter to the view of Justice Stewart

(Footnote continued on following page)

subcontractor agreement in issue locks in the preferred class of contractors and locks out everyone else, thereby granting the union building trades and the employers under contract to them a monopolistic stranglehold on the market. As this Court observed in *Allen Bradley*,

> ". . . [I]f business groups, by combining with labor unions, can fix prices and divide up markets, it was little more than a futile gesture for Congress to prohibit price fixing by business groups themselves." 325 U. S. 810.

Moreover, as so well put by Judge Clark in his dissent below,

> "Since no general contractor could withstand the pressure of having his entire work picketed, the meaning to everyone in the plumbing trades is clear—get in Plumbers Local 100 or get out of business." (Pet. App. B-50).

Undoubtedly, therefore, unless struck down by this Court, the type of employer boycott resulting from such unrestrained union activity will sweep through the construction industry like wild fire, consuming those employers and their employees who dare resist.

From the standpoint of the employer not in the preferred class, if the union refuses, for any reason, to enter

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(Footnote continued from preceding page)

in his dissent in *National Woodwork Mfrs. Ass'n* v. *NLRB*, 387 U. S. 612 (1967), wherein he said:

> "The courts and the National Labor Relations Board fully recognized that Congress had intended to ban product boycotts along with other forms of the secondary boycott, and that it had not distinguished between 'good' and 'bad' secondary boycotts. In a 1949 decision involving Section 8(b)(4), the Board stated that 'Congress considered the "product boycott" one of the precise evils which that provision was designed to curb.' The courts agreed." 387 U. S. at 658 (footnote omitted).

into a collective bargaining agreement with him, he and his employees are foreclosed from the market place. There is no way that an employer or his employees can force a union to sign a collective bargaining agreement. The employer and his employees are, therefore, at the mercy or whim of the union. The union is in the position of complete dominance and can dictate which employers may enter the market place and whether they remain.

Having this awesome power, the union is likewise in the position of dictating how the employer may conduct his business in other respects, either within or without the framework of a collective bargaining agreement. As so aptly observed in *Labor Unions and Public Policy*:[15]

> "Unions already do many things which directly 'restrain trade' in the product market and which businessmen cannot do—merely because they are unions and exempt from the anti-trust laws. They may be, and have been, used in effect as 'agents' of employers to enforce collusive agreements with respect to product prices. And in cases where producers for some reason are unable to form or maintain a monopoly agreement, unions have a special incentive to exercise monopoly power in the product market for their own ends. Indirectly unions may already have more influence on raising costs and thus prices than do businessmen. . . . [T]he public will awake one day to find that a degree of economic control, which it would never have tolerated in the hands of businessmen, has already passed into the hands of someone else."

If the conduct herein is permitted, that day has come. *Amici* herein represent thousands of contractors and home builders who cannot provide sorely needed facilities at fair prices for the old, the needy, the underprivileged, and

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[15] Chamberlin, Bradley, Reilly & Pound, *Labor Unions and Public Policy*, 17, 18 (1958).

the vastly expanding needs of our economy, if such impediments to free and fair competition are allowed to flourish. It is clear that once the union is elevated to this position of power, even the desires of the employees in the preferred unit can be meaningless and rights under Section 7 of the NLRA completely destroyed. A vote in such a unit to decertify the union is tantamount to electing unemployment.

As Judge Clark concluded in his dissent below:

> "Therefore, I would hold that where a union bypasses the congressionally sanctioned methods of organizing the employer whose employees it seeks to unite (here, the individual subcontractors) and illegally brings pressure on a neutral, secondary source of work for all such employers within an area (Connell) to force that unrelated economic entity to execute a contract which requires that all directly involved subcontractors bring their work forces into the membership of this local or starve for lack of work, then that union has passed beyond the scope of antitrust immunity." (Pet. App. B-57) (footnote omitted)

b. The Conspiracy and Combination to Restrain Trade.

The court of appeals viewed the facts of this case as not violating the "conspiracy test" enunciated by this Court in such cases as *Allen Bradley*, and *Penington*, or the "legitimate union interest" test explicated in *Jewel Tea*. In both instances the majority of the Court failed to perceive the massive nature of this employer boycott bottomed on an agreement in restraint of trade.

The factual record below clearly establishes that the Union had previously entered into a master area agreement with the area multi-employer bargaining unit of mechanical and plumbing contractors whereby the Union agreed that it would ". . . not grant or enter into any arrangement or understanding with any other employer,

which provides for any wages less than stipulated in this Agreement . . ." (A. 118)[16] The record shows that the Union would not permit any employer to sign a contract other than the Master Area Agreement (A. 73-74). That agreement surely does not comport with the standard pronounced in *Pennington*, where the Court said:

> "We think it beyond question that a union may conclude a wage agreement with the multi-employer bargaining unit without violating the anti-trust laws and that it may as a matter of its own policy, *and not by agreement with all or part of the employers of that unit*, seek the same wages from other employers." 381 U. S. 664 (emphasis added).

Perforce, if the union goes beyond that limitation and specifically agrees in writing that no other employer will be given better rates, it is a clear antitrust violation. That is precisely the case here.

By contrast and drawing from the teachings of *Pennington*, the Board considered the legality of such "most favored nations" clauses in *Dolly Madison Industries, Inc.*, 182 N.L.R.B. 1037 (1970). In that case the clause provided in essence that should the union at any time enter into an agreement with an employer in the same industry which provided for more favorable terms and conditions, the signatory employer would be privileged to adopt such advantageous terms and conditions as its own. Holding such a provision to be lawful and comparing it to *Pennington*, the Board stated:

> ". . . [A]s pointed out by the Supreme Court, the union by reason of the clause there involved abandoned the right to which it and those of its members who were employed by other employers were

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[16] Article XIX, Master Collective Bargaining Agreement. NOTE, References to A. refer to the Appendix filed herein.

entitled under the Act to bargain collectively with such other employers concerning substantial terms and conditions of employment—and this to the detriment of itself and other members, thereby frustrating the purposes of the Act." 182 N.L.R.B. 1038.

Yet, the majority decision below would sanction conduct which permits the Union to extract an agreement from Connell which would broaden that conspiracy or combination (between the Union and the multi-employer unit of plumbing contractors) by requiring Connell to impose the union contract upon its subcontractors or cease doing business with them. Moreover, the majority decision sanctions such conduct by way of economic coercion even though Connell does not have employees who are represented by the Union. In this case, therefore, apart from the illegal nature of the "most favored nations" clause sought, there is absent that critical factor without which such demand is improper, namely, the conventional bargaining relationship.

Consequently, the evil so well enunciated by this Court in *Pennington* and by the Board in *Dolly Madison* is apparent. Connell has now become through coercion an unwilling party to the conspiracy or combination between the Union and members of the favored employer group. The conspiracy or combination is a very real one which has the effect of preventing employers outside of the preferred class and their employees from doing business with Connell and from determining their own destiny under our federal labor law policy. Manifestly, the agreement would virtually eliminate real competition in the construction industry by removing as competitive factors critical elements of a contractor's costs. Indeed, the conspiracy here is more tightly constricted than in normal antitrust cases. The agreement imposed upon Connell would prevent it from doing business with an employer even on the same terms as members of the association, if (a) *his employees were either unrepresented,* or (b) *were represented by another union and already covered by a contract,* or (c) *the Union refused, for whatever reason it chose, to permit such employer a contract.*

Connell must deal only with an employer under contract to the Union and on no more favorable terms. And so the conspiratorial circle is closed and the illegal combination advanced as more and more employers seeking to do business with Connell (or other general contractor parties to the agreement) must execute a contract with the Union regardless of whether it is in their best interest or that of their employees.

The restraint of trade herein is accomplished by the Union's application of economic coercion with resultant "domino effect". The testimony of Union Business Agent Patterson indisputably shows: (1) that the Union will only permit a contractor to sign the master area agreement (A. 73-74), and (2) that the Union has picketed contractors throughout the area for the past three years to obtain this type of agreement (A. 84). Thus, the Union, using economic coercion and the master area agreement as the basic contractual device, successively knocks over recalcitrant contractors, thereby ever broadening the illegal combination and contract in restraint of trade, with Connell simply being one of the dominoes.

The conspiracy test of *Allen Bradley* and *Pennington* have, therefore, been met and, as we shall seek to demonstrate in the section of this brief devoted to the labor law aspects of this case, had the Court majority not erroneously refused to consider the legality of the union's actions under the NLRA, it would have reached the conclusion that such conduct was unlawful under the Act and thus not legitimate under *Jewel Tea* standards.

As this Court has stated, the Sherman Act is "a comprehensive charter of economic liberty", *Northern Pacific Ry.* v. *United States*, 356 U.S. 1, 4 (1958): "The heart of our national economic policy long has been faith in the

value of competition", *Standard Oil* v. *FTC,* 340 U.S. 231, 248 (1951); and Courts should not impute to Congress an intent to carve out "vast exceptions" to the Sherman Act unless the Congressional purpose is plain, *Schwegmann Bros.* v. *Calvert Distillers Corporation,* 341 U.S. 384, 395 (1950).

Moreover, of controlling significance is the fact that this case does not involve a labor dispute between Connell and its employees.

As this Court declared in *Columbia River Packers Ass'n* v. *Hinton,* 315 U. S. 143 (1942), an antitrust case having labor law overtones:

> "We recognize that by the terms of the statute there may be a 'labor dispute' where the disputants do not stand in the proximate relation of employer and employee. But the statutory classification, however broad, of parties and circumstances to which a 'labor dispute' may relate does not expand the application of the Act to include controversies upon which the employer-employee relationship has no bearing." 315 U. S. at 146, 147 (footnote omitted).

Accordingly, for the foregoing reasons we submit the Union herein has violated the antitrust provisions of both federal and state law.

POINT II

The agreement in issue is of such an illegal nature as to preclude the determination that it represents a legitimate union interest for antitrust purposes.

The court majority below, having failed to find a conspiracy or combination in restraint of trade, turned its attention to whether the Union had a legitimate interest in

bringing pressure upon Connell to enter into the agreement in issue. However, to fully resolve that question, as the majority found, it is first necessary to inquire into the meaning of Sections 8(b)(4)(A), (B) and 8(e) of the NLRA as amended. Regrettably, concluding that the initial decision in such matters is within the exclusive domain of the Board, the majority discussed but failed to pass upon these questions. Having done so, it abandoned that which was its legitimate concern, namely to apply the *Jewel Tea* test to the union's conduct. Only through such an inquiry and determination can light be shed upon whether the union is pursuing a legitimate interest. Such an issue cannot be ignored. Indeed, there can be no finding that the restrictive agreement does not violate the federal antitrust laws without first finding that the forcing of such pervasive employer boycotts is a legitimate union objective, that is, conduct protected by the NLRA, or at least not unlawful under its provisions.[17]

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[17] As Judge Clark commented in his dissent below:

> "Not all union misconduct constituting an unfair labor practice should entail a loss of union antitrust exemption; only the conduct which violates the congressionally-protected commercial rights of neutral parties would normally fall without the exemption. It is neither necessary nor appropriate for this dissent to attempt a complete catalogue of that labor law illegal conduct which falls without the exemption. Suffice it to say that since Section 8(e) is designed and intended to protect neutral parties from concerted boycotts required by union activity, a violation of that provision under circumstances similar to those here will place a union beyond the scope of the exemption." (Pet. App. B-56, n. 10).

Representation Rights Under the National Labor Relations Act

The *sine qua non* to lawful collective bargaining between an employer and a labor organization is the presence of a direct employer-employee relationship. Collective bargaining simply cannot take place in the absence of such a relationship. Moreover, recognition, with all the rights that flow therefrom, both to employers, labor organizations and employees, must conform to procedures and requirements set forth in the Act. In this regard, there are only three basic ways that an employer may lawfully recognize and deal with a labor organization under the Act:

(1) Following certification pursuant to a Board conducted election under Section 9 of the Act.

(2) By volunutary recognition upon a showing of majority status by the union and without need of Board certification;

(3) Pursuant to Section 8(f), the single exception in the Act allowing voluntary recognition *in the absence of employees*: (This exception applies only to the construction industry.)

When Congress, in 1959, enacted Section 8(f), it was extremely careful to note that a prehire agreement could only be obtained through *voluntary* means and without picketing.

As the Ninth Circuit said in *Construction, Production and Maintenance Laborers Local 1383* v. *NLRB*, 323 F. 2d 422 (9th Cir. 1963):

> "Section 8(f) makes certain prehire collective bargaining agreements, otherwise unlawful under the Act, permissible in the construction industry; but the legislative history contains statements specifically disclaiming an intention thereby to authorize strikes or picketing to coerce such prehire agreements." 323 F. 2d at 425.

The provision also states that such an agreement ". . . shall not be a bar to a petition filed pursuant to Section 9(c) or 9(e)".[18] Accordingly, once employees are hired by the employer, if they are dissatisfied with their union representation, not having been granted a prior opportunity to select their bargaining representative, despite the existence of a lawful collective bargaining agreement, they may file a decertification petition.

Therefore, as this brief will show, these procedures and many other provisions throughout the Act effectively protect employee rights guaranteed under Section 7, and to this extent the rights of construction workers are the equal of others. They are not and never were intended to be subordinate.

Having established the predicate for bargaining, a direct employer-employee relationship brought about through the use of one of the procedures outlined above, the parties are now free to enjoy the full range of rights provided in the Act. Certain rights and privileges under the Act inure to the benefit of employees, employers, or labor organizations, but in each case, they protect neutrals and the public at large, as a basic cornerstone of our national labor policy. That policy as expressed in the Act is:

> "Section 1. (b) Industrial strife which interferes with the normal flow of commerce and with the full production of articles and commodities for commerce, can be avoided or substantially minimized if employers, employees, and labor organizations each recognize under law one another's legitimate rights in their relations with each other, and above all recognize under law that neither party has any right in its relations with any other to engage in

[18] 29 U.S.C. §158(f).

acts or practices which jeopardize the public health, safety, or interest.

"It is the purpose and policy of this Act, in order to promote the full flow of commerce, to prescribe the legitimate rights of both employees and employers in their relations affecting commerce, to provide orderly and peaceful procedures for preventing the interference by either with the legitimate rights of the other, to protect the rights of individual employees in their relations with labor organizations whose activities affect commerce, to define and proscribe practices on the part of labor and management which affect commerce and are inimical to the general welfare, and to protect the rights of the public in connection with labor disputes affecting commerce."[19]

It is against this background that Connell's facts must be considered.

Initially, it must be emphasized that Connell had contracts with various trade unions representing all of its craft employees. It had no employer-employee relationship with employees who do plumbing work or the type of unit work represented by Local Union 100. More particularly, Local 100, itself, disclaimed any intention of seeking a relationship in which it would either furnish employees to Connell or allow Connell to obtain employees. In short, Local 100 did not want a Section 8(f) prehire contract. Obviously, as already shown, such an agreement could not lawfully be obtained by coercion. Thus, Local 100 characterized its conduct as expressing the sole desire to force Connell to agree that it would only deal with employers with whom Local 100 had contracts. Accordingly, no direct employer-employee relationship exists, nor was there ever the intention on the part of either party to establish any such relationship.

[19] 29 U.S.C. §141(b).

Patently, because of the lack of a direct employer-employee relationship, any picketing engaged in by Local 100 under these circumstances is clearly unlawful and should be struck down. Not so, says Local 100, because the construction industry proviso to Section 8(e) of the Act grants this bargaining right to Local 100 irrespective of the lack of any employer-employee relationship. This very contention was erroneously adopted by the district court below but not dealt with by the majority opinion. Consequently, it is a critical issue that must be examined by this Court.

Amici know of no other cases in which the Board or any court has considered this issue and specifically ruled that an employer can be forced by a union to enter into a "hot cargo" clause in the total absence of any basis for a collective bargaining relationship. Indeed, such a holding would completely eviscerate and render meaningless many if not all of the provisions of the Act designed to protect the rights of employees guaranteed by Section 7 and the numerous duties and obligations of all parties that flow therefrom.

In *National Woodwork,* discussing whether or not certain work preservation clauses violated the secondary boycott provisions of the Act, this Court stated:

> ". . . The touchstone is whether the agreement or its maintenance is addressed to the labor relations of the contracting employer vis-a-vis his own employees." 386 U. S. at 645.

Connell has no employees represented by this labor organization and the union specifically disavows recognition. The union's objectives must, therefore, be tactically directed elsewhere. In fact, the court below found that:

> ". . . The central reason that the union wants the agreement sought in this case is that it will be helpful in organizing other subcontractors." (Pet. App. B-29)

Thus, the "vis-a-vis" relationship is totally absent and the primary purpose of the Act, namely, to promote free collective bargaining *pursuant to statutorily required procedures* is defeated. A new organizational and recognitional technique is born. Fortunately, the fallacy of this method has previously been exposed to judicial scrutiny and struck down.

In *Dallas Bldg. and Constr. Trades Council* v. *NLRB (Dallas Building Trades)*, 396 F. 2d 677 (D. C. Cir. 1968), the Court of Appeals for the District of Columbia found that Section 8(b)(7)(A) prohibits the picketing of an employer for the purpose of compelling it to execute a subcontracting agreement ". . . where another union is already lawfully recognized and when representation issues are in a state of statutory repose." 396 F. 2d at 678.

There the Court stated:

> "'[E]mployers are entitled to the protection of Section 8(b)(7)(A) against actions which tend to erode or even destroy their right to operate unimpeded by outsiders' threats and picketing, under the collective bargaining terms lawfully negotiated with their employees' representatives.'" 396 F. 2d at 681.

In *Dallas Building Trades*, the Court quoted from its earlier decision in *Centralia Bldg. and Constr. Trades Council* v. *NLRB*, 363 F. 2d 699 (D. C. Cir. 1966), in which it upheld the Board's determination that:

> ". . . [P]icketing by an unrecognized labor organization to obtain an agreement from the employer obligating him to pay his employees union wages and fringe benefits was recognitional and therefore in violation of Section 8(b)(7)(C)." 396 F. 2d at 683.

The Court further observed:

> ". . . *Centralia*, however, does not mean that Section 8(b)(7) is violated only when the picketing union seeks to preempt the entire scope of interest of a recognized representative of the employees. The thrust of *Centralia* is that, so long as the union seeks a contract dealing with a subject relating to the conditions of employment of the general contractors' *own employees*, the picketing is recognitional within Section 8(b) (7)." 396 F. 2d at 683 (emphasis added).

Thereafter, in *Lane-Coos-Curry-Douglas Counties Building and Construction Trades Council*, 165 N.L.R.B. 538 (1967), enforced, 415 F. 2d 656 (9th Cir. 1969), the Board, in considering another subcontractor agreement case where the general contractor was picketed to compel his execution of such agreement, found that the agreement contained provisions restricting the contracting and subcontracting of work by the general contractor who was already covered by existing collective bargaining agreements with the various unions. The Board said:

> ". . . For reasons given in *Dallas Building and Construction*, we find that the picketing to secure such an agreement was for an object of recognition and bargaining within the meaning of Section 8(b) (7). It must also be found, as the Trial Examiner did, that this picketing was conducted by a labor organization which was not certified to represent any of Chamber's employees, that it occurred at a time when Chambers was lawfully recognizing other unions, and that a question concerning representation could not be raised as to such employees under Section 9(c) of the Act." 165 N.L.R.B. 538 (footnote omitted).

In *Lane-Coos*, the union argued that any contracts that Chambers did have were prehire agreements which did not preclude a question concerning representation. The Board in response stated:

> ". . . The record plainly shows, for example, that Chambers' laborers and carpenters were already

members of the Laborers and Carpenters, respectively, when the contracts with these unions were executed. Accordingly, we conclude that the Respondents' picketing was proscribed by Section 8(b)(7)(A) of the Act." 165 N.L.R.B. 538.

This Board opinion clearly demonstrates that the basic rights of the employees within the general contractor's unit were fully protected and under no circumstances could an intrusion be made into that collective bargaining relationship. Again, in *Dallas Building Trades, supra,* when the contention was advanced that areawide agreements with building trades unions are a recognized pattern of bargaining and, therefore, should be considered appropriate in such a setting, the court responded:

> ". . . Even if areawide subcontracting agreements have been adopted by multi-member bargaining units, the Council has not shown that those agreements *were obtained by picketing* or that the labor organizations with which they were negotiated were not recognized within the meaning of Section 9." 396 F. 2d at 682. (footnote omitted) (emphasis added)

Obviously, here again, the District of Columbia Circuit was concerned with agreements which are obtained by *coercion* rather than by lawful means of recognition under the Act. Moreover, the court recognized that such conditions ". . . [W]ould have a significant impact upon some of the general contractors' employees." 396 F. 2d at 680.

It pointedly observed:

> ". . . Whether or not the employees would be benefitted by the proposal of the outsider union is irrelevant if that proposal would bind the employer with respect to a matter about which the recognized union may bargain as exclusive representative of the employees." 396 F. 2d at 680.

> "The Association has already bargained with several of the local craft unions for the omission of subcontractor clauses from its agreement. Its members should be shielded from coercion on the second front by an organization with which they have no obligation to bargain." 396 F. 2d at 681.

The Building Trades Council argued that the collective bargaining contracts with the various local unions were prehire agreements and that therefore the council could properly seek recognition because under Section 8(f) such contracts "shall not be a bar to a petition filed pursuant to Section 9(c)." The court responded:

> "[T]he legislative history of Section 8(f) reveals that Congress envisioned its pre-hire provisions as applying only to the situation where the parties were attempting to establish a bargaining relationship for the first time." 396 F. 2d at 680, n. 4.

Thus, the court would not allow the Council, using Section 8(f) or any other guise, to disturb the established and continuing bargaining relationship between the employers and the local unions representing their employees. In short, after an initial 8(f) contract where employees have been hired pursuant thereto—any subsequent contract enjoys the protections of the Act that flow to a normal relationship based upon majority status.

Lastly, the Building Trades Department AFL-CIO, as *Amicus,* advanced an argument that a Section 8(b)(7)(A) violation cannot occur unless the effort is to displace completely the recognized union. In short, it argued that a stranger union may negotiate on something less than a full contract or for certain limited issues. The court met this argument squarely by saying:

> ". . . This contention goes beyond that of the Council, and does not appear to be compatible with the clear purpose of Section 8(b)(7) *to prevent any infringement of the recognized union's representa-*

tive status." (Emphasis added.) 396 F. 2d at 680, n. 5.

Thus, if a stranger union is not permitted to disturb the existing collective bargaining relationship, its activity in seeking to extract a subcontractor clause is secondary as to that employer.

Any conduct that involves the construction industry proviso to Section 8(e) must be secondary in nature, otherwise the proviso is not involved. *Accordingly, if a union attempts to draw support from that proviso to sustain the legality of its conduct, it concedes that failing same its conduct must be unlawful secondary activity in violation of Sections 8(b)(4)(A), (B) and 8(e) of the Act.*[20]

Section 8(b)(7)(A) protects the general contractor and its employees from eroding intrusions upon their relationship. The proviso to Section 8(e), on the other hand, *allows the general contractor's employees and them alone,* because of their vis-a-vis bargaining relationship with their employer, freedom to negotiate a voluntary subcontractor clause or, depending upon their scale of values, to seek other benefits in lieu thereof. *Dallas Building Trades,* 396 F. 2d at 681. See also, dissent of Justice Douglas in *Sand Door,* 357 U. S. at 112. Stated another way, Section 8(b)(7)(A) protects the existing relationship and the proviso to Section 8(e) allows that relationship full play with regard to whether or not such a clause may be negotiated.

Clearly, the Union herein does not, and cannot, have a primary relationship with Connell, for Connell does not employ its members. Therefore, the Union's relationship to Connell is and must remain secondary. Since its activity is directed against Connell, its employees and their mutual bargaining relationship, such activity cannot escape such result.

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[20] This Court has previously held that the same conduct may violate more than one section of the Act. *NLRB* v. *Local 825 Operating Engineers, (Burns & Roe),* 400 U. S. 297 (1971).

POINT III

To hold that the activity of the union herein is protected by the construction industry proviso to Section 8(e) would distort the Act and lead to bizarre consequences in its enforcement.

The distortions that would arise from a finding that a vis-a-vis relationship is not necessary to the legality of clauses of the kind here involved would leave the Act in a chaotic state and defeat its purposes. In this factual setting, where Connell was not previously foreclosed from doing business with any subcontractor, such a construction of the Act would usher in a parade of horribles. Those that come readily to mind include the following:

Let us assume Employer A, a plumbing subcontractor, has already entered into a lawful collective bargaining contract with Union B, a union other than Local 100. How then may this employer sign a contract with respondent Local 100 without committing an unfair labor practice? As an employer outside the preferred class of contractors, the emloyer would clearly be in violation of the rights of the union he has previously recognized and the employees it represents.

If the employees of Employer A have rejected Local 100 in a Board conducted certification election, how may the employer sign a contract with Local 100 against the expressed and continuing desires of its employees? Thus, Employer A is again precluded from doing business with Connell.

Let us assume further that the employees of Employer A had not heretofore been represented by a union and their employer entered into a Section 8(f) prehire agreement with Local 100. Assume further the employees became extremely dissatisfied with Local 100, petitioned the Board for an election and decertified Local 100. Once again, how could their employer by not being in the favored class and under contract with Local 100 do busi-

ness with Connell? In either of these illustrations both the employees and their employer are forced from the market place.

Assuming that none of the foregoing situations was an impediment, if Employer A decided to enter into a Section 8(f) prehire agreement with Local 100, but Local 100, for whatever reason, refused to permit Employer A to sign the multi-employer association agreement or an individual agreement, he could not work for Connell. Thus, that employer and his employees are foreclosed from doing business with Connell and other general contractors similarly situated and, quite incongruously, even if the employer and his employees sincerely wanted a relationship by collective bargaining agreement with Local 100.

Because of the illicit "most favored nations clause" present in the contract between Local 100 and its favored group of employers, it is not free to engage in good faith collective bargaining because it is bound to offer new employers no better contract than negotiated under the master multi-employer agreement. This clearly cuts against the public interest. Moreover, it would constitute an unfair labor practice and a refusal by Local 100 to bargain in good faith. Indeed, it makes the "take it or leave it" or so-called "Bulwarism"[21] approach to bargaining innocuous by comparison. At least "Bulwarism" was predicated upon a collective bargaining relationship in which the parties had previously negotiated their own agreement and the only issue was the "take it or leave it" stance of one of the parties.

What is the result if rival unions, possibly emerging unions dedicated to the representation of minorities, ethnic groups and females, likewise exerted economic coercion to compel execution of similarly restrictive agreements? If a basis for collective bargaining is not needed,

[21] *NLRB* v. *General Electric Company*, 418 F. 2d 736 (2nd Cir. 1969), cert. denied, 397 U. S. 965 (1970), rehearing denied, 397 U. S. 1059 (1970).

what is to prevent an employer from being successively picketed by rival unions for such agreements? Does the employer capitulate to the demands of each? What does an employer do in the case of a small job where no union subcontractor submits a bid or the only bid or bids are excessively high? If the employer is forced to sign more than one such agreement, what are his legal defenses, if any, when sued for specific performance or damages?

Looking further into the havoc that would be caused by a finding that a vis-a-vis relationship is not necessary to the legality of agreements such as in issue here, *amici* pose these questions:

On what basis would it be timely for employees of another union, such as a District 50 or an independent union, to seek recognition to obtain a similar contract? How would the Board's normal contract bar principles apply in such circumstances, if they would be applicable at all? If another union were to seek recognition in the same way as Local 100, could it picket indefinitely without the need for filing a petition? If a petition were to be filed, could or would the Board entertain it and if so on what basis, the 30% showing of interest of the employees of a different employer than Connell? How many unions could picket the general contractor and for how long for this type of agreement? Moreover, if the employees of Connell decide that they affirmatively *do not want* such a provision (perhaps because Connell is losing work opportunities due to the high cost of mechanical bids from the preferred employers), are Connell's employees and *their Union* engaging in a secondary boycott in trying to bring about a cessation of business between Connell and the preferred employers under contract with Local 100? If this were so, doesn't it oust Connell's employees from a permissible subject of collective bargaining in a rather odd and unforseen way?

Is Connell in these circumstances exposed to a suit by Local 100 under Section 301 of the Act by way of specific performance or damages? If specific performance

were granted to Local 100, could it be said that the employees of Connell in the union with which it has a collective bargaining agreement are not also entitled to their own bargain and to specific performance or enforcement of their contract. Obviously, both theories are on a collision course and at odds with each other.

Could it be alleged that picketing for a subcontractor agreement by a second union gives rise to a jurisdictional dispute with Local 100 under Section 8(b)(4)(D) of the Act? If the first agreement were valid, then it certainly would seem true that subsequent picketing would violate Section 8(b)(4)(D). However, if such circumstances give rise to a jurisdictional dispute, why is it not so in the first instance where employees of other employers, whether organized or not, are in possession of and performing such work? If the general contractor succumbed to the demands of the second union seeking a subcontractor agreement, could the union party to the first agreement picket? And, would such picketing be immune to Section 8(b)(4)(D) on the theory that the employer has violated his agreement? Is not the employer on a merry-go-round from which there is no escape?

Consider also the incongruity of this situation. If Connell were to agree with Union A, i.e. a carpenter's union representing its own employees, that it would only subcontract to an employer having an agreement with the member unions of the local Building Trades Council, such an agreement under the clear principles of *Sand Door* and the legislative history of Section 8(e) could not be enforced by a strike. If Connell were to breach the agreement the only recourse available to Union A would be to institute a suit for civil damages or perhaps specific performance. Yet, under the decision below, Local 100 could strike to obtain such a clause for its own benefit. In effect, Local 100 would have the enforcement powers denied to Union A.

This entire range of new problems would not exist except for the obvious evisceration of fundamental concepts in the Act and the avoidance of sound Board and judicial precedents of long standing. Patently, a new law is being written and not by Congress. If a common situs picketing bill has perennially been rejected by Congress,[22] and it has, if *NLRB* v. *Denver Bldg. and Constr. Trades Council* (*Denver Building Trades*), 341 U.S. 675 (1951), still has vitality (and the legislative history of 1959 is extremely clear that it has),[23] and if our national labor policy as most recently expressed in *Boys' Market* v. *Retail Clerks Union, Local 770*, 398 U. S. 235 (1970), favors procedures for the orderly resolution of disputes, should a strange new concept be adopted that would effectively sweep away all of the law developed to date?

In a factual setting like *Denver Building Trades* the electrical union there need only change its picket sign to indicate that it is seeking the execution of a subcontractor agreement from the general contractor and that conduct would be lawful. Thus, the teachings of this Court in *Denver Building Trades* and the long line of cases adhering thereto would become meaningless. If this were the case, then unions by coercive means could compel execution of these type agreements of unlimited duration which would apply to all contractors on all future jobs. Hence, there would be no requirement that labor disputes must exist or that any offending subcontractor be present on the job site. Obviously, such a result obviates *Moore Drydock*,[24] *General Electric*[25] and other sound precedents.

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[22] See for example H.R. 9070, H.R. 9089, H.R. 9373, and S. 2643 (86th Congress, 1960); H.R. 10027 (89th Congress 1965); H.R. 100 (90th and 91st Congress, 1967, 1969); H.R. 7438 (92nd Congress); and H.R. 4726 (93rd Congress, 1973).

[23] II Legislative History of the Labor-Management Reporting and Disclosure Act of 1959 1433.

[24] *Sailors Union of the Pacific*, 92 N.L.R.B. 547 (1950).

[25] *Local 761 International Union of Electrical Radio and Machine Workers, AFL-CIO* v. *NLRB*, 366 U. S. 667 (1961).

If the union is free to make such a "collective bargaining" demand and by economic coercion bring an entire job to a standstill, what are the rights of the contractor? Does Section 8(b)(3) of the Act, which imposes the duty to bargain in good faith upon a union apply in the absence of recognition of the union? (It should be recalled Local 100 disclaims any interest in recognition.) How then may Local 100 be compelled to bargain in good faith if the section of the Act imposing that obligation upon a union has no application? While the union is free to make such a demand as in the instant situation to the point of exerting economic coercion, what recourse does an employer have to apply leverage on the union? He has no employees that may go on strike if he bargains to impasse nor does he have employees he may lawfully lock out or replace. He is completely without any economic leverage, which can hardly be considered the type of collective bargaining relationship contemplated by the Act. As Justice Brennan said in *NLRB* v. *Insurance Agents International Union, AFL-CIO*, 361 U. S. 477, 489 ". . . [T]he presence of economic weapons in reserve, and their actual exercise on occasion by the parties, is part and parcel of the system that the Wagner and Taft-Hartley Acts have recognized."

What are Connell's rights to insist, if Connell acts as a government contractor, that the subcontractor agreement contain provisions that the union will agree to furnish members of minority and ethnic groups or females from its hiring hall in numbers required by Connell in order that the contractor on Connell's job, and thus Connell, can remain in compliance or come into compliance with federal and state statutes and regulations which provide for equal employment opportunity on their job sites? How does Connell or any subcontractor with whom Connell would do business guarantee that the protections set forth in *Mansion House*[26] and *Bekins*[27] are available?

[26] *NLRB* v. *Mansion House Center Management Corp.*, 473 F. 2d 471 (8th Cir. 1973).

[27] *Bekins Moving & Storage*, 21 N.L.R.B. No. 7 (1974).

Consider also that if this method of obtaining a subcontractor agreement is upheld, there is absolutely no limitation to its breadth or scope. An International union in the building trades can strike a major general contractor at any location in the United States and force that particular employer to deal only with contractors under a contractual relationship with that particular International union. In one fell swoop any International union in the AFL-CIO or the Teamsters could force a standard contract nationwide, bringing the cycle full circle and back to that which prompted Section 8(e) in the first place, namely, sweeping and offending "hot cargo" relationships declared inimical to the public interest.

Certain references in the Act should also be noted. For example, Section 201 of the Act uses phraseology throughout that refers to "collective bargaining between employers and the representatives of their employees."[28] Section 203(c) directs the Director of the Mediation Service to pursue various means to settle disputes "including submission to the employees in the bargaining unit of the employer's last offer of settlement for approval or rejection in a secret ballot."[29] Obviously, in a setting such as the one here involved with no employees being represented by Local 100, in the event of a termination of the agreement and an effort at bargaining, pursuit of such an act by the Mediation Service is literally impossible.

We have attempted by these examples to point out the complete incompatibility of the majority's decision with the basic purposes of the NLRA. While the construction industry enjoys a certain "favored" status under the Act, we emphasize again that the vital element absent here is that the agreement does not address itself to the labor relations of the "employer *vis-a-vis* his own employees." *National Woodwork Mfrs. Ass'n* v. *NLRB.*

[28] 29 U.S.C. §171(a).

[29] 29 U.S.C. §173(c).

Failing this, it is clear secondary boycott activity. Thus, the union's interest is not legitimate and cannot avoid antitrust strictures prohibiting such a massive restraint of trade.

The legislative history of the Act, as evidenced by the oft quoted but badly construed words of then Senator Kennedy, Congressman Barden, and others in the development of Section 8(e) provisions, unalterably support that conclusion and admit of no other.

POINT IV

This Court's prior decisions and the clear legislative history of the 1959 amendments prohibit coercion to compel execution of hot cargo contracts in the construction industry.

A full understanding of Section 8(e) requires reconsideration of the principles articulated by Justice Frankfurther in this Court's *Sand Door* decision. In that case, Justice Frankfurter, speaking for the Court, said that a union is free to approach an employer to persuade him to sign a "hot cargo" clause *voluntarily*, and thus, to engage in a boycott, so long as the union refrains from coercion. Therefore, while recognizing that prior to the enactment of Section 8(e), in 1959, a labor organization and an employer could voluntarily enter into a "hot cargo" agreement, this Court nevertheless held that such a contract could not be enforced by coercive means specifically prohibited in Section 8(b)(4)(B) formerly (A) of the NLRA.[30]

[30] Significantly, the dissent of Justice Douglas in *Sand Door*, which was joined by Chief Justice Warren and Justice Black and which would have permitted enforcement of such a provision by coercion, was based upon the reasoning that if the clause was the

(Footnote continued on following page)

It was also clear and undisputed law prior to the 1959 Section 8(e) amendment that a union could not strike to obtain such a clause without violating the secondary boycott provisions of the Act. *Texas Industries Inc.*, 112 N.L.R.B. 923, enforced, 234 F. 2d 296 (5th Cir. 1956); *Bangor Bldg. Trades Council*, 123 N.L.R.B. 484, enforced, 278 F. 2d 287 (1st Cir. 1960); *Bricklayers, Masons and Plasterers, Int'l Union (Selby-Battersby & Co.)*, 125 N.L.R.B. 1179 (1959).

Initially, the congressional purpose of the 1959 amendments was to outlaw all "hot cargo" agreements in all industries even if voluntary in nature. Thus, Section 8(e) makes all such contracts heretofore or hereafter entered into unenforceable and void. However, two industries received more favorable treatment, the apparel and clothing industry and the construction industry.

Authorities are in accord that the apparel and clothing industry proviso to Section 8(e) is more sweeping, exempting such industry from both Section 8(e) and Section 8(b)(4) as well. By its terms the apparel and clothing industry proviso allows Section 8(b)(4) conduct, i.e. picketing, inducement and other forms of economic co-

(Footnote continued from preceding page)

product of *voluntary collective bargaining*, it should be enforceable just as any other provision of a collective bargaining agreement. Said Justice Douglas:

> "That provision was bargained for like every other clause in the collective agreement. It was agreed to by the employer. How important it may have been to the parties—how high or low in their scale of values—we do not know. But on these records *it was the product of bargaining, not of coercion.*" 357 U. S. at 112. (emphasis added)

And later he added:

> "Certain it is that where he *voluntarily agrees* to the 'unfair' goods clause he is not forced or coerced in the statutory sense." 357 U. S. at 113, 114. (emphasis added).

ercion to obtain and enforce an agreement otherwise prohibited by Section 8(e). But as the construction industry proviso indicates and as shown by the legislative history, this exemption was only intended to preserve to labor organizations in the constructoin field the rights which they possessed under *Sand Door* and prior Board and court decisions before enactment of Section 8(e). Patently, before 1959 such agreements could only be obtained *voluntarily* and free from coercion.

In addressing this subject, Senator Kennedy said:

> *"Since the* [8(e)] *proviso does not relate to Section 8(b)(4), . . .*
> *It is not intended to change the law with respect to the judicial enforcement of these contracts, or with respect to the legality of a strike to obtain such a contract."* II Legislative History of the Labor Management Reporting & Disclosure Act of 1959, 1433 (emphasis added)

Additionally, Representative Barden, Chairman of the House Labor Committee and a member of the Conference Committee, who presented the Conference Report to the House, stated that the first proviso to Section 8(e) would permit the making of *voluntary* agreements relating to contracting and subcontracting of work to be done at a construction site.[31]

Also, specifically preserved were the principles enunciated by this Court in *Denver Building Trades* condemning secondary boycotts intended to enmesh neutral contractors in disputes not their own.[32]

[31] Congressman Barden stated: "The first proviso under subsection (e) of section 704 permits the making of *voluntary* agreements between a labor organization and an employer in the construction industry relating to the contracting or subcontracting of work to be done directly on the site of construction." (emphasis added) II Legislative History of Labor Management Reporting & Disclosure Act of 1959, 1715.

The principles involved herein were brought into sharp focus by Justice Frankfurter in *Sand Door* wherein he observed:

> ". . . A more important consideration, . . . is the possibility that the contractual provision itself may well not have been the result of choice on the employer's part free from the kind of coercion Congress has condemned. It may have been forced upon him by strikes that, if used to bring about a boycott when the union is engaged in a dispute with some primary employer, would clearly be prohibited by the Act. Thus, to allow the union to invoke the provision to justify conduct that in the absence of such a provision would be a violation of the statute might give it the means to transmit to the moment of boycott, through the contract, the very pressures from which Congress has determined to relieve secondary employers." 357 U. S. 93, 106.

There never has been any expression by this Court since *Sand Door* in a construction industry case, approving the use of any form of coercion to obtain a "hot cargo" provision in a collective bargaining agreement. While the issue in *Sand Door* involved a strike to enforce a "hot cargo" provision, Justice Douglas observed in his dissent that the clause in *Sand Door* ". . . was the product of *bargaining, not of coercion*". 357 U. S. at 112 (see n. 30) (emphasis added).

[32] Senator Kennedy said: "This proviso affects only section 8(e) and therefore leaves unaffected the law developed under section 8(b)(4). The *Denver Building Trades* (341 U. S. 675) and the *Moore Drydock* (92 N.L.R.B. 547) cases would remain in force." II Legislative History of the Labor-Management Reporting & Disclosure Act of 1959, at 1433.

Since Congress only intended to preserve the *status quo* or take a photograph of the law as it then existed[33] construction unions, therefore, came away with no greater rights than they enjoyed prior to the enactment of the provision to Section 8(e). Yet, the decision below would permit a coercive boycott of secondary employers of unlimited reach, and simultaneously draw to the preferred union and preferred employers, as though by a giant magnet, all of the available work of Connell and other general contractors. Thus, it sanctions a jurisdictional dispute of grand design to the exclusion of other union or nonunion employees. Moreover, the majority decision below confers an extraordinary, exclusive and preferred status upon construction unions enjoyed by no others and clearly goes far beyond any result envisioned by Congress.

The special treatment accorded the construction industry by the proviso to Section 8(e)—authorization to *voluntarily* enter into "hot cargo" agreements is comparable in nature to the special treatment of that industry conferred elsewhere in the amended Act. By the new Section 8(f), Congress likewise gave recognition to the special circumstances pertaining in the industry differentiating it from manufacturing and sales enterprises. Section 8(f) permits construction unions and employers to enter into *voluntary* prehire collective bargaining agreements and to make the union-security provisions of their contracts effective after only 7 days, practices which would otherwise constitute employer violations of Section 8(a) (1), (2), and (3) and union violations of Section 8(b) (1) (A) and (2). As the legislative history makes clear, Congress did

[33] As then Senator Kennedy said: "The first proviso under new section 8(e) of the National Labor Relations Act is *intended to preserve the present state of the law* with respect to picketing at the the site of a construction project and with respect to the validity of agreements relating to the contracting of work to be done at the site of a construction project." (emphasis added) 105 Cong. Rec. 17900, II Legislative History of Labor-Management Reporting & Disclosure Act of 1959 at 1433.

not intend by Section 8(f) to legitimize strikes or picketing to coerce an employer's acceptance of these agreements.[34]

Thus, on what possible basis can the picketing in this case lawfully bring about such a contract with Connell? Is it at all logical to assume that Congress in 1959 would have so carefully drafted Section 8(f), creating unusual new rights and protecting these rights against abuse by prohibiting coercion to obtain them in a primary situation but allow coercion in an admittedly secondary situation to bring about this type of an agreement? There is not one word of legislative history to support such a contention!

The legislative history of the 1959 amendments makes it clear beyond doubt that the status of the law was to be retained. Justice Brennan writing for the majority in *National Woodwork* buttresses this position by observing that "[P]rovisos were added to Section 8(e) to preserve the *status quo* in the construction industry and exempt the garment industry from the prohibitions of Section 8(e).

Consequently, the issue of whether coercive conduct may be utilized in seeking a "hot cargo" clause, is one of novel impression before this Court since the 1959 amendments, and the opportunity here presented enables this Court to cure the Board's error in the reversal of its unanimous decision in *Construction, Production and Maintenance Laborers Local 1383 (Colson & Stevens)*, 137

[34] H.R. Rep. No. 1147 on S. 1555, 86th Cong., 1st Sess. p. 42, I Leg. Hist. 946 ("Nothing in [8(f)] is intended * * * to authorize the use of force, coercion, strikes or picketing to compel any person to enter into such prehire agreements."); 105 Cong. Rec. 18128, II Leg. Hist. 1715; cf. *Sperry* v. *Plumbers Local 562*, 210 F. Supp. 743 (W. D. Mo. 1962), 52 LRRM 2673, 2676-2677 (holding that Section 8(f) provides no defense to an 8(b)(7)(C) charge); *N.L.R.B.* v. *Int'l Hod Carriers Union, Local 1140*, 285 F. 2d 397, 403 (5th Cir. 1960), cert. denied, 366 U. S. 903.

N.L.R.B. 1650 (1962), *rev'd, Construction, Production and Maintenance Laborers Local 1383* v. *NLRB.*, 323 F. 2d 422 (9th Cir. 1963).

In *Colson & Stevens* the Board extensively reviewed the legislative history of the 1959 amendments and concluded that this history ". . . makes it manifest that Congress did not intend to change existing law with respect to the legality of picketing to obtain and enforce agreements of the type . . ." here involved. 137 N.L.R.B. at 1651. The Board found that proposition implicit in this Court's *Sand Door* opinion. Then, quoting Senator Kennedy's statement that the Section 8(e) proviso was not intended to change the law with respect to the judicial enforcement of contracts, excepted by the proviso or *with respect to the legality of a strike to obtain such a contract*, the Board reached the necessary conclusion that the picketing of Colson violated Sections 8(b)(4)(A) and (B) of the Act.

The decision of the unanimous five-member Board in *Colson & Stevens* convincingly stated:

> "This reading, we believe, gives hospitable scope to the competing interests which Congress here sought to balance. To construe the statute as condemning coercive enforcement of agreements of the type here involved but condoning coercion as a means of obtaining such agreements would in our view be to pay observance to slavish literalism and to frustrate the congressional objective. The Supreme Court periodically reminds us of the familiar principle of statutory construction that words used in a statute should not be literally construed, even where their literary purport is clear, *if such construction would lead to absurd and incongruous results plainly at variance with the policies of the legislation as a whole. United States* v. *American Trucking Association*, 310 U. S. 534, 542-543; *Ozawa* v. *United States*, 260 U. S. 178, 194." 137 N.L.R.B. at 1652, n. 7 (emphasis added).

As can be seen from that finding, once the proviso to Section 8(e) cannot be used to defend against clear secondary conduct, an 8(b)(4)(A) and (B) violation must follow!

Regrettably, even though *Colson & Stevens* represented the unanimous expression of the full five-member Board and was followed by the Board in many cases,[35] the Board later succumbed to errant reasoning and reversed its original well-reasoned and well-founded opinion.[36] Now that very question is before this Court.

Consequently, the Board's reversal of *Colson & Stevens* and other ill-founded court decisions stand in conflict with *Sand Door*, the legislative history of the 1959 amendments and other significant precedents prior to 1959. These decisions do not comport with either *Sand Door* or *National Woodwork* nor are they consistent with the purposes of the proviso to Section 8(e) or Section 8(f).

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[35] Cases in which the Board followed its *Colson & Stevens* doctrine include: *Local 825, Operating Engineers (Building Contractors Association of New Jersey)*, 145 N.L.R.B. 952 (1964); *Local 300 Hod Carriers Union (Fiesta Pools Inc.)*, 145 N.L.R.B. 911 (1964); *Los Angeles Building Trades Council (Treasure Homes)*, 145 N.L.R.B. 279 (1963); *Southern Calif. District of Laborers (Swimming Pool Gunnite Contractors)*, 144 N.L.R.B. 978 (1963); *Los Angeles Building and Construction Trades Council (Stockton Plumbing Co.)*, 144 N.L.R.B. 49 (1963); *Essex County and Vicinity District Council of Carpenters*, 141 N.L.R.B. 858 (1963); *Los Angeles Building & Construction Trades Council (Interstate Employers, Inc.)*, 140 N.L.R.B. 1249 (1963); *Operating Engineers Union (Sherwood Construction Co.)*, 140 N.L.R.B. 1175 (1963); *Building and Construction Trades Council of Orange County (Sullivan Electric Company)*, 140 N.L.R.B. 946 (1963); *Local Union 825 Operating Engineers (Nichols Electric Company)*, 140 N.L.R.B. 458 (1963); *Building and Construction Trades Council of San Bernadino, Etc. (Gordon Fields)*, 139 N.L.R.B. 236 (1962); *Local 60 United Association of the Plumbing Pipefitting Industry (Binnings Construction Co., Inc.)*, 183 N.L.R.B. 1382 (1962).

[36] *Northeastern Indiana Bldg. & Constr. Trades Council (Centlivre Village Apartments)*, 148 N.L.R.B. 854 (1964).

The factual setting in *Connell* represents a completely novel approach to collective bargaining. As *amici* have urged above, the union scheme and restrictive agreement here involved clearly run counter to the entire fabric of the Act. It fosters rather than eliminates industrial strife and does so in a manner completely at odds with the rights of the public in violation of our labor and antitrust statutes.

Never has a case reached this Court that involves such a frontal attack on the basic fundamental concepts that underlie the legislative purposes of the Act. Combined with all of its frightening antitrust implications, this case probably ranks high on the list as one of the most important antitrust cases since the passage of Taft-Hartley.

While certain "hot cargo" agreements are permitted by the proviso to Section 8(e), because of their broad secondary boycott ramifications, Congress has very cautiously acceded to such *voluntary arrangements free from coercion*. Thus, our national labor policy has been balanced against the serious effects of secondary activity with restrictive competitive effects and this is the result. Construction unions have been given wide berth—wider than any other industry in the country except the apparel and clothing industry. However, this special privilege should not be abused.

Common situs bills have been perennially rejected by Congress. *Denver Building Trades* still has vitality. *Sand Door, General Electric, Moore Drydock, Boy's Market* and so many other valid decisions of this Court regulate activity in this industry and teach us that collective bargaining should not be allowed which foists upon the public the unnecessary and unlawful disruptions of commerce as herein involved. In sum, this new statagem must be labeled for what it is—a clear secondary boycott of wide scope with unlimited antitrust implications.

The distortions and confusion that conflicting errant far-reaching decisions in this field have spawned cry out for correction by this Court in order to restore a clear picture of the guideposts and pathways to legitimate objectives for both labor and management in the nation's largest industry.

CONCLUSION

For all of the foregoing reasons and based upon the record as a whole, the Court is respectfully urged to find the conduct herein violative of the National Labor Relations Act, the Sherman Act and the Texas antitrust statute.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-1256

CONNELL CONSTRUCTION COMPANY, INC.,
Petitioner,

v.

PLUMBERS AND STEAMFITTERS LOCAL UNION NO. 100 OF UNITED ASSOCIATION OF JOURNEYMEN AND APPRENTICES OF THE PLUMBING AND PIPEFITTING INDUSTRY OF THE UNITED STATES AND CANADA, AFL-CIO,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF FOR AIR-CONDITIONING AND REFRIGERATION INSTITUTE, AMERICAN BOILER MANUFACTURERS ASSOCIATION, AIR MOVING AND CONDITIONING ASSOCIATION, INC., ARCHITECTURAL WOODWORK INSTITUTE, AMERICAN CONSULTING ENGINEERS COUNCIL, NATIONAL ELECTRICAL MANUFACTURERS ASSOCIATION, NATIONAL SOCIETY OF PROFESSIONAL ENGINEERS, AND NATIONAL WOODWORK MANUFACTURERS ASSOCIATION, AS AMICI CURIAE

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INTRODUCTION

This brief on behalf of Air-Conditioning and Refrigeration Institute, American Boiler Manufacturers Association, Air Moving and Conditioning Association, Inc., Architectural Woodwork Institute, American Consulting Engineers Council, National Electrical Manufacturers Association, National Society of Professional Engineers, and National Woodwork Manufacturers Association, as *amici curiae*, is filed pursuant to written consent of the parties under Rule 42(2) of this Court. The *amici* herein support the position of the petitioner, Connell Construction Company, Inc.

INTEREST OF THE AMICI CURIAE

The associations participating in this joint brief represent a broad cross-section of the manufacturers, designers and specifiers of products and materials used in construction throughout the United States. They have participated individually and jointly in numerous cases before the National Labor Relations Board, the lower federal courts and this Court testing the legality of various restrictive agreements and pressures between unions and contractors in the construction industry. They have consistently advocated effective implementation of the federal labor and antitrust laws to prevent unwarranted restrictions upon the use of competitive, efficient methods and materials in construction. While the *amici* thus have a substantial common interest in the issues presented in this case, they have varying economic stakes in the outcome of these proceedings. The interest of each of the *amici* is set forth below.

A. The Air-Conditioning and Refrigeration Institute (ARI)

ARI is a national trade association consisting of approximately 175 manufacturing companies in the air-

conditioning and refrigeration industry. These companies are the principal manufacturers of the end-products and components in this industry, which has a total volume annually in excess of $3.4 billion. End-products include unitary air-conditioners, room fan coil and air induction air-conditioners, centrifugal, absorption, and reciprocating liquid chilling packages, and central station air handling units. Components include compressors, motors, condensers, condensing units, coils, controls, valves, tubing, wiring, and refrigerant gases. Plants of ARI members are located throughout the United States and the air-conditioning and refrigeration equipment they manufacture is sold and shipped to every state and to foreign countries.

B. American Boiler Manufacturers Association (ABMA)

ABMA is a trade association representing approximately 80 manufacturers and distributors of steam boilers and related equipment. These companies, which are located throughout the United States, are the principal manufacturers of packaged boilers and components. Their annual production of such boilers exceeds $100,000,000.

C. Air Moving and Conditioning Association, Inc. (AMCA)

AMCA is an international trade association comprised of companies manufacturing fans and other air moving devices used in industrial and commercial ventilating and air-conditioning systems. An affiliated division includes manufacturers of louvers, dampers and shutters. The total membership includes 67 U.S. manufacturers. Products which they produce are valued at approximately $200,000,000 annually.

D. Architectural Woodwork Institute (AWI)

AWI is a national trade association of 380 manufacturers and distributors of architectural woodwork.

Products of its members consist of a wide variety of precut, prefit or preassembled items or materials, such as beams, special windows, doors, wall paneling, cabinet work and all forms of custom mill work for architectural and aesthetic purposes, used in homes, public buildings, schools and churches. The total volume of such products produced by AWI members approximates $150,000,000 annually.

E. American Consulting Engineers Council (ACEC)

ACEC is a federation of state and regional associations comprising some 2,500 independent engineering firms. These firms range from highly specialized sole proprietors to large, multi-office general practitioners. The firms represent more than 7,000 legally registered (in accordance with state laws) principals and partners, plus more than 40,000 engineering technicians and other employees. Consulting engineering is a $3 billion per year U.S. industry. Firms design airports, bridges, dams, harbors, parks, power plants, stadia, waste treatment plants and similar facilities worth $35 billion.

F. National Electrical Manufacturers Association (NEMA)

NEMA is a national trade association consisting of approximately 540 members who manufacture, *inter alia*, electrical control panels, enclosed switches, panel boards, industrial controls, conduit fittings, outlet and switch boxes and wiring devices installed in all types of structures during their erection on construction sites. Total sales of the electrical manufacturing industry in 1973 amounted to over $58 billion.

G. National Society of Professional Engineers (NSPE)

NSPE is composed of 67,000 members through 53 affiliated state organizations (including the District of Columbia, Puerto Rico and Guam) and approximately

500 local chapters. The members are involved in all fields of engineering practice and all branches of engineering. Approximately 13,000 of the Society members are engaged in the private practice of engineering. Also, many members of the Society are engaged in engineering activity for industry and for federal, state and local governments.

H. National Woodwork Manufacturers Association (NWMA)

NWMA actively represents the interests of wood door, window and millwork manufacturers. Its membership currently includes approximately 90 manufacturers and 20 associates who are suppliers to the industry. Their production represents the majority of wood windows and doors made in the United States and amounts to approximately $300,000,000 annually.

ARGUMENT

I. Introduction

In view of the many able briefs filed by the parties and other *amici curiae* herein tracing the development of antitrust principles as applied to labor-business combinations and analyzing their relationship with federal labor legislation, it would serve little purpose to undertake yet another full-scale treatment of those matters in this *amicus* brief. Accordingly, we shall merely summarize briefly, under Point II below, certain controlling principles of antitrust and labor law which we believe were disregarded or misapplied by the majority of the court of appeals. We shall then concentrate our attention, in Point III, upon certain practical considerations regarding the construction industry which we believe must be taken into account in resolving the issues presented herein.

II. The Union's Subcontracting Agreement With Connell, and Its Procurement and Maintenance Thereof, Violated Controlling Principles of Federal Labor and Antitrust Law.

This Court's prior decisions clearly establish the dual prerequisites for a labor organization's enjoyment of immunity from the antitrust laws. First, the organization must act on its own and not conspire or combine with any non-labor interest to restrain competition or injure the business of another. *United Mine Workers* v. *Pennington*, 381 U.S. 657 (1965); *Allen-Bradley* v. *IBEW, Local 3*, 325 U.S. 797 (1945). Secondly, even in the absence of such a conspiracy or combination, a union must confine its anticompetitive activities to lawful conduct undertaken pursuant to a "legitimate union interest." *Local 189, Amalgamated Meat Cutters* v. *Jewel Tea Co.*, 381 U.S. 676 (1965).

Although the majority of the Fifth Circuit panel below acknowledged the existence of this "two-fold test" (Pet. App. B-21), its conclusion that the dual conditions for immunity were satisfied here stems from a faulty interpretation of both requirements.

First, in holding that the Union's agreement with Connell did not constitute a combination or conspiracy in restraint of trade, the court was apparently of the view that a union's combination with a single non-labor entity is not sufficient to defeat the union's antitrust immunity. Thus, the court indicated that there would have to be an existent conspiracy to monopolize between at least two non-labor entities, with which the union joined, in order for the union to lose its exempt status (Pet. App. B-22-23). In this view, a union could not create an illegal conspiracy, but could attach itself to one already in existence.

In so holding, the majority below went a step beyond this Court's prior holdings and, we submit, in the wrong direction. It transmuted into a rule of law Mr. Justice Black's *arguendo* assumption in the *Allen-Bradley* case, *supra*, that an employer-union agreement to boycott non-union goods "standing alone would not have violated the Sherman Act." (325 U.S. at 809). But an agreement between two parties which forecloses dealing with a third is none the less a "combination in restraint of trade" within the meaning of the Sherman Act simply because one of the parties is a union.

Mr. Justice Black's assumption that such an agreement would be exempt was clearly dictum on the facts of *Allen-Bradley* and was premised on the then-current broad view of labor's antitrust immunity as derived from the Norris-LaGuardia Act. See *United States* v. *Hutcheson*, 312 U.S. 219 (1941). After *Allen-Bradley*, and partially in response to the above-quoted dictum therein, Congress specifically undertook in the Taft-Hartley amendments of 1947 and the Landrum-Griffin amendments of 1959 to narrow the scope of union activity protected by Norris-LaGuardia by prohibiting secondary boycotts and "hot cargo" agreements of the sort referred to by Mr. Justice Black. This subsequent legislation, we submit, necessarily had the concomitant effect of narrowing labor's antitrust immunity. Accordingly, any validity there may once have been to the notion that a union's combination with a single employer could not constitute an illegal conspiracy for antitrust purposes has now clearly been extinguished.[1]

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[1] In any event, it is unrealistic to view the Union-Connell combination in isolation. The record shows that the Union is party to an area wide master agreement binding all signatory subcontractors to observe identical wage rates, and incorporating a pledge by the Union not to grant any other contractor more favorable terms. Thus, an illegal conspiracy does exist, and the agreement with Connell merely expands it.

A related point which is implicit in the court's reasoning below but, in our view, inconsistent with governing antitrust principles, is the notion that both parties to an illegal conspiracy must be willing participants therein. Nothing in the antitrust laws suggests the need for an inquiry into the motives of each party to a combination in restraint of trade. A coerced conspirator is just as much a conspirator as a willing one. Thus, if a union persuades, induces or even coerces a businessman to combine with it in a manner calculated to restrict competition and injure the business of others, the union's immunity is lost, just as it would be if the businessman had been the moving party in the scheme. Any contrary rule would give a legitimizing effect to raw economic power, which would be totally inconsistent with the philosophy and purpose of the antitrust laws.

Accordingly, we believe that there was clearly a "combination" or "conspiracy" in restraint of trade in the present case, and that dismissal of the complaint was therefore unwarranted.

The second major precondition to a union's antitrust immunity—that its action be calculated to promote a legitimate union interest—was also misapplied by the majority below. We believe, with dissenting Judge Clark, that union conduct which violates the National Labor Relations Act thereby automatically loses its claim to absolute antitrust immunity. As Judge Clark stated:

> There is no justifiable reason to reflexively afford an antitrust exemption to conduct which Congress has expressly forbidden to labor organizations. The secondary boycott prohibitions of the Labor-Management Relations Act, as amended by Labor-Management Reporting and Disclosure Act, were intended to prevent such a use of economic power directed towards neutral parties. When a union seeks to organize those who work for an employer or group

> of employers there can be no doubt that Congress has granted it freedom from antitrust prosecution to act in concert against such employers in order to bring such employees as may be affected into a unified group of sufficient size to allow the union to deal on a par with management. Congress' balance of the competing interests, as I divine legislative intent, is calculated to produce union peer status, but not union dominance. Therefore, I would hold that where a union bypasses the congressionally sanctioned methods of organizing the employer whose employees it seeks to unite (here, the individual subcontractors) and illegally brings pressure on a neutral, secondary source of work for all such employers within an area (Connell) to force that unrelated economic entity to execute a contract which requires that all directly involved subcontractors bring their work forces into the membership of this local or starve for lack of work, then that union has passed beyond the scope of antitrust immunity. (Pet. App. B-56-57, footnotes omitted).

Judge Clark noted that the rule thus stated "may bear a superficial resemblance" to the Court's holding in *Duplex Printing Press Co.* v. *Deering*, 254 U.S. 443 (1921), which this Court subsequently held in *Apex Hosiery Co.* v. *Leader*, 310 U.S. 469 (1940), had been effectively overruled by the Norris-LaGuardia Act. However, as Judge Clark pointed out, subsequent Congressional action has changed the state of the relevant law since the time of *Apex*, and secondary boycotts are now specifically recognized as illegitimate except where they are expressly permitted. This Court reached essentially the same conclusion in *National Woodwork Mfrs. Ass'n* v. *N.L.R.B.*, 386 U.S. 612, 632 (1967), when it stated that:

> In effect Congress, in enacting Section 8(b)(4)(A) of the Act, returned to the regime of *Duplex Printing Press Co.* and *Bedford Cut Stone Co.*

Thus, as under *Duplex*, the scope of legitimate union activity was seen as limited to "trade union activities directed against an employer by his own employees." *Id.* at 621. Secondary activity directed against a neutral employer and "carried on for its effect elsewhere" was recognized as exepecting legitimate union interests. *Id.* at 632.

It therefore becomes necessary, in resolving the antitrust issues presented herein, for the Court to consider whether the Union's contract with Connell and its procurement thereof were illegal under the amendments to the National Labor Relations Act. Like Judge Clark, we believe it was clear error for the court below to defer ruling on this issue on the ground that it rested within the "primary jurisdiction" of the National Labor Relations Board. (Pet. App. B-59-61). This Court rejected a similar contention in *Jewel Tea, supra*, declaring that "the doctrine of primary jurisdiction is not a doctrine of futility." 381 U.S. at 686. To hold in the present case that the courts must withhold consideration of the antitrust issues raised by the complaint until the Board determines the labor law issues would result in an even greater futility than the "expensive and merely delaying administrative proceeding" decried by the Court in *Jewel Tea*. In this case it would foreclose the plaintiffs from obtaining any remedy, since the NLRB General Counsel has effectively barred their access to that agency's adjudicatory processes.[2] Congress cannot have intended, when it divided the initial adjudicative authority under the labor and antitrust acts between administrative and judicial tribunals, that parties subjected to conduct violative of both statutes should have resort to neither forum.

[2] See Pet. 6, n. 3, where it is pointed out that, despite the urging of the Fifth Circuit majority, the General Counsel of the NLRB continues to refuse to issue unfair labor practice complaints in cases presenting the statutory issue involved herein.

Thus, finally reaching the statutory issue which the Fifth Circuit majority refused to consider, we submit that the Union's agreement with Connell and its pressures to obtain it clearly violated Sections 8(b)(4)(A) and 8(e) of the National Labor Relations Act. First, as Judge Clark reasoned, the defense that the agreement was protected by the construction industry proviso to Section 8(e) is unavailable to the Union on the facts of this case, since Connell, in entering that agreement, did not act in the capacity of "an employer in the construction industry" within the meaning of the proviso. (Pet. App. B-62). Indeed, the fact that Connell may literally have been "an employer" has no relevance for these purposes, since the Union never dealt with Connell in any capacity relating to Connell's own employees. On these facts, it would have made no difference if Connell was merely an individual operator who had no employees at all of his own on the job. Yet in that case he clearly would not be "an employer in the construction industry," even under the literal language of the proviso.

We believe that Congress, in exempting jobsite hot cargo agreements "between a labor organization and an employer in the construction industry" from the general ban of Section 8(e), clearly had in mind only agreements negotiated between a union and *an employer acting in his capacity as an employer of workers represented by that union.* It would make no sense to prohibit unions from entering such agreements with general contractors having no employees of their own, but allow them where the general contractor happened to have some employees of another trade whom the union had no interest in representing. To so hold would make the proviso's applicability hinge on an accident of circumstance wholly unrelated to its purposes.

Nor did Congress intend in Section 8(e) to blur the distinction between general contractors and subcontractors

so as to treat the general contractor on a construction project, in effect, as "an employer" of the subcontractor's employees. Indeed, although commentators had urged such a rationale under the Taft-Hartley amendments,[3] this Court specifically held in *N.L.R.B.* v. *Denver Bldg. Trades Council*, 341 U.S. 675 (1951), that the separate status of independent contractors on construction projects must be given full effect under Section 8(b)(4) of the Act. When Congress enacted Section 8(e) and the construction industry proviso thereto in 1959, it made clear that it intended *Denver* to "remain in full force and effect." Conf. Rep., H. Rep. No. 1147, 86 Cong., 1st Sess., p. 39 (1959), I 1959 Leg. Hist. 1433. Moreover, several attempts to reverse *Denver* by legislation have failed. See *N.L.R.B.* v. *Muskegon Bricklayers Union No. 5*, 378 F.2d 859, 862-863 (6th Cir., 1967). See also, H. Rep. No. 741, 86 Cong., 1st Sess., pp. 22-23, I 1959 Leg. Hist. 780-781. Accordingly, we submit that Connell was not serving in the capacity of "an employer in the construction industry" within the meaning of the proviso in any of its dealings with the Union, and that the jobsite exception to Section 8(e)'s general ban on secondary boycott agreements is therefore inapplicable.

Furthermore, even if the construction industry proviso had been otherwise applicable, we submit that it would not have legitimized the Union-Connell agreement, because that agreement was obtained only as a result of coercive economic pressure by the Union. In this regard, we refer the Court to the Labor Board's well-reasoned decision in *Construction, Production & Maintenance Laborers Union, Local 383 (Colson and Stevens Constr. Co.)*, 137 NLRB 1650 (1962), holding that only vol-

[3] See, e.g., Comment, The Impact of the Taft-Hartley Act on the Building and Construction Industry, 60 Yale L. J. 673, 689 (1951), where the writer urged that for purposes of the secondary boycott provisions of the Act "all the men working on the [construction] job should be considered the general contractor's employees . . . ."

untary agreements are within the construction industry proviso to Section 8(e). Although the Board later repudiated that holding in response to its rejection by several courts of appeals,[4] it was, we submit, a proper construction of Sections 8(b)(4)(A) and 8(e), and should now be adopted by this Court. Congress made it clear that in adding the jobsite proviso to Section 8(e), it did not intend to "change existing law with respect to . . . the legality of a strike to obtain [a jobsite secondary boycott] contract."[5] The "existing law" thus referred to undisputedly held that a union could not strike to obtain such a clause, in the construction industry or elsewhere, without violating the secondary boycott provisions of the Act.[6] This was so even though, at the time, voluntary hot cargo agreements were held to be permissible under the Act. *Local 1976, Carpenters (Sand Door & Plywood Co.)*, 357 U.S. 93 (1958).[7]

III. The Practical Effect of Agreements to Boycott Non-Union Subcontractors Is to Restrain Competition Based Upon Technology and Efficiency of Operation, As Well As Competition Based Upon Labor Rates.

Although the court below acknowledged the principle of the *Jewel Tea* case, *supra*, that labor's antitrust im-

[4] See *Northeastern Indiana Bldg. & Constr. Trades Council (Centlivre Village Apartments)*, 148 NLRB 854, *enf. denied*, 352 F.2d 606 (D.C. Cir., 1965).

[5] H. Rep. 1147, 86th Cong., 1st Sess., pp. 39-40; see also remarks of Senator Kennedy, II 1959 Leg. Hist. 1433.

[6] See, e.g., *Texas Industries, Inc.*, 112 NLRB 923, enf'd, 234 F.2d 296 (5th Cir., 1956); *Bangor Bldg. Trades Council*, 123 NLRB 484, enf'd 278 F.2d 287 (1st Cir., 1960); *Bricklayers, Masons & Plasterers Union (Selby-Battersby & Co.)*, 125 NLRB 1179 (1959).

[7] The *Sand Door* decision, *supra*, was perceived by Congress as creating a "loophole" in the secondary boycott provisions of the Act and was one of the reasons Congress took steps in the 1959 amendments "to plug [such] loopholes." See, e.g., II 1959 Leg. Hist. 1431 (Remarks of Senator Kennedy).

munity does not extend to anticompetitive action which exceeds legitimate union interests, the majority reasoned that the Union's conduct here was immune since its "only anticompetitive aspect is that the unions have succeeded in eliminating that feature of competition based on lower standards or wages." (Pet. App. B-32). In practice, however, the anticompetitive impact of an agreement limiting subcontracting to firms signatory to a union contract inevitably extends far beyond competition based on wages and working conditions. For it is a reality of the construction industry that a general contractor who agrees to deal only with unionized subcontractors thereby subscribes not only to union approved wage rates and working conditions, but also to an elaborate set of restrictions upon the methods, materials and components that may be used on any project where he is engaged.

To illustrate the foregoing point, we need not look beyond the practices of the international union with which the respondent herein is affiliated. It is a standard feature of Plumbers' Union contracts with plumbing and mechanical contractors throughout the country to include detailed restrictions upon the use of pipe and other materials cut or fabricated off the jobsite.[8] Standing alone, such clauses may or may not impose valid "work preservation" obligations upon the immediate, signatory employer within the meaning of *National Woodwork, supra.* But in practice, these agreements have frequently been interpreted as obligating the signatory subcontractors to either force architects, engineers, general contractors and others involved in construction projects to modify their specifications to conform with union-approved methods, or else refuse to do business with them. The result is

[8] See, e.g., *American Boiler Mfrs. Ass'n* v. *N.L.R.B.*, 404 F.2d 547 (8th Cir., 1968), and 404 F.2d 556 (8th Cir., 1968), *cert. denied*, 398 U.S. 960; *Local 636, United Ass'n* v. *N.L.R.B.*, 430 F.2d 906 (D.C. Cir., 1970); *George Koch Sons, Inc.* v. *N.L.R.B.*, 490 F.2d 323 (4th Cir., 1973).

that not only are unionized subcontractors severely limited in the ways in which they can do business, but general contractors dealing with them are subject to similar limitations.

In *Local 636, United Ass'n (Mechanical Contractors Ass'n of Detroit, Inc.)* 177 NLRB 189 (1969), a sister local of the Union herein invoked such a clause in its contract with the plumbing subcontractor on a hospital project to block the use of factory-piped fan coil heating and cooling units which had been specified by the architect and engineer on the project. In reversing the Labor Board's finding that the union acted unlawfully, the court of appeals brushed aside the contention that the conduct unduly limited competition in the methods and materials that could be used. The court stated that a builder who wishes to use prefabricated components "may seek another contractor not bound by such a restrictive union contract." *Local 636, United Ass'n* v. *N.L.R.B.*, 430 F.2d 906, 910 (D.C. Cir., 1970). But if, as here, the builder or general contractor were bound by an agreement not to deal with non-union plumbers, the alternative would be foreclosed and the product boycott inescapable.

Work-restriction agreements of the sort described above are themselves of dubious validity from an antitrust standpoint.[9] The Fourth Circuit, in *Sachs* v. *Local 48, United Ass'n, etc.*, 454 F.2d 879 (1972), made the significant observation that the "mark of a labor dispute is the presence of economic adversaries." The court pointed out that both the subcontractor and his employees may stand to gain by the exclusion of prefabricated products from the jobsite. For where work is done on

[9] It is noteworthy that this Court, in *National Woodwork*, was careful to point out that it was expressing no view upon the antitrust limitations upon "work preservation" agreements found lawful under the Labor Act. 386 U.S. 612, at 631 n.19.

the jobsite rather than in the factory, there is normally not only an increase in the available work for jobsite employees, but a commensurate increase in the contract price paid to the subcontractor. See also, *George Koch Sons, Inc.* v. *N.L.R.B.*, 490 F.2d 393 (4th Cir., 1973). Consequently, the subcontractor may often be more than just an unwilling ally in the union's effort to cause the construction users to cease purchasing prefabricated goods.

The additional leverage gained when such restrictive relationships are combined with an obligation binding the general contractor to deal only with unionized subcontractors makes the restraint upon competition complete. Project owners, architects and engineers are left without the option of utilizing prefabricated or factory assembled components, since their general contractor himself is barred from dealing with subcontractors who are free to install such components. The effect is to deny construction users and the general public the benefits of improvements in technology, materials and efficiency, and to foreclose the opportunity for factory pretesting of components to assure compliance with the highest quality and safety standards.

It is clear that Congress did not intend, in enacting the jobsite proviso to Section 8(e), to authorize such restrictions upon the use of prefabricated products and components in construction projects. The legislative history of the proviso specifically shows that it was not meant to "cover boycotts of goods manufactured in an industrial plant for delivery at the jobsite." See II 1959 Leg. Hist. 1433 (remarks of Senator Kennedy), and I 1959 Leg. Hist. 934, 943 (the Joint Committee Conference Report). This rule applies even if similar or substitute work could be done at the jobsite. *International Union of Operating Engineers, Local 12 (Acco Constr. Equip., Inc.)*, 204 NLRB No. 115 (1973); *Ohio Valley*

Carpenters Dist. Council (Cardinal Industries, Inc.), 136 NLRB 977, 988 (1962).

Unfortunately, however, Labor Board procedures have been only partially effective in limiting the use of such agreements to effectuate product boycotts on construction sites. The Board has, to be sure, resolutely prohibited the use of strikes and strike threats to enforce such agreements in situations where the pressured employer lacks the "right of control" over the decision whether to utilize prefabricated products or jobsite techniques and is, therefore, "powerless to end the dispute." See *Local 438, United Ass'n, etc. (George Koch Sons, Inc.)*, 201 NLRB No. 7, 82 LRRM 1113 (1973), *enf'd*, 490 F.2d 323 (4th Cir., 1973), and cases cited therein. However, the Board has had only limited success in persuading the courts of appeals to approve its view,[10] and the issue has not yet been presented to this Court.[11]

Furthermore, two recent Board decisions involving Plumbers Union affiliates in Southern California appear to authorize a new product boycott technique which significantly undermines the protection derived from prior Board rulings. The cases hold that unions are free to enforce work-restriction agreements through fines and other contractually-specified penalties against the signatory subcontractors, even though strikes or threats for the same purpose would be unlawful. *Southern Calif. Pipe Trades Dist. Council No. 16 (Associated General Contractors of Calif., Inc.)*, 207 NLRB No. 58, 84 LRRM 1513 (1973); *Southern Calif. Pipe Trades Dist.*

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[10] Compare the Fourth Circuit's decision in *Koch, supra*, with *Local 742, Carpenters Union (J. L. Simmons Co.)* v. *N.L.R.B.*, 444 F.2d 895 (D.C. Cir., 1971), and *Local 636, United Ass'n* v. *N.L.R.B., supra*.

[11] The Court explicitly stated in *National Woodwork, supra*, that the validity of the right of control doctrine was "[n]ot before us." 386 U.S. at 616-617, n.3.

Council No. 16 (Kimstock Div., Tridair Industries, Inc.), 207 NLRB No. 59, 84 LRRM 1518 (1973). Thus, in the *Associated General Contractors* case, *supra*, the union invoked fines and other contract penalties against a plumbing subcontractor on a hospital construction project to punish him for assertedly "violating" his contract by installing certain prepiped surgical scrub stations which had been fabricated by Steelworkers Union members in an East Coast manufacturing plant. The scrub stations had been purchased by the project owner and were specifically required in the construction contract with the general contractor. Their design incorporated special water flow and temperature control mechanisms which the jobsite plumbers were found to be incapable of producing. Nevertheless, the Labor Board, expressly bypassing "the secondary-primary employer and work preservation issues," [12] held that the union could penalize the subcontractor under the parties' bargaining agreement for failing to boycott the scrub stations.

Similar contract fines and penalties were permitted to be enforced in the *Kimstock* case against subcontractors who "violated" the work-restrictions of their agreements with the union by failing to honor a boycott against prefabricated fibreglass combination bathtub-shower units, even though, again, the decision to utilize the prefabricated product did not rest with the subcontractor.

In effect, the Board allowed the union in the *AGC* and *Kimstock* cases to construe its collective bargaining agreements as imposing a valid obligation on the subcontractor to boycott independent third persons who purchased or specified prefabricated goods. In other words, the Board approved an interpretation of the contract which clearly set out an employer-union combination in re-

[12] The Board also failed to pass on the question of whether the agreements, as applied, fell within the construction industry proviso to Section 8(e).

straint of trade. Moreover, the Board went further and elevated the agreements, as thus construed and enforced, to the status of a defense to an unfair labor practice charge. This not only fails to recognize the illegality of such agreements, but actively encourages building trades unions to negotiate for them.

Review proceedings are pending in both the *AGC* and *Kimstock* cases (9th Cir., Docket Nos. 73-3354 and 73-3439 respectively), and we are hopeful that the Board's decisions will be set aside. Nevertheless, we believe that it is extremely important that this Court, in considering the issues in the present case, be fully aware of current lower court and agency decisions delineating the scope of the building trades unions' power to dictate the ways in which business can be done in the construction industry. Should a decision issue from this Court upholding the right of the unions to coerce Connell-type subcontracting agreements from general contractors while Board rulings such as those in *AGC* and *Kimstock* stand, the survival of competition based upon efficiency of operation and technology in the construction industry would be seriously endangered.

For these reasons, we believe it is vitally important for the Court to set forth, in its opinion in this case, specific guidelines clarifying the antitrust and labor law limitations upon the right of building trades unions to compel policy and operational changes on the construction jobsite. In our view, the clearest formula for measuring that right, and the one most in tune with established antitrust and labor law principles, would be a rule that the union's right is coextensive with the bargaining obligation between it and the employer in question. In other words, a union violates secondary boycott prohibitions and loses its antitrust immunity when it attempts to force a change in labor policies or methods of operation the substance of which is not bargainable

with an employer owing the union a bargaining duty. Support for this view may be found in both Mr. Justice White's and Mr. Justice Goldberg's opinions in *Jewel Tea*.[13] In the labor law context, additional support for such a test is provided by this Court's decision in *National Woodwork*. The Court therein recognized (386 U.S. at 642-643) that the employees' right to a lawful "work-preservation" clause is a corollary to the employer's obligation under Section 8(a)(5) of the Act to bargain over the contracting out of bargaining unit work under the doctrine established in *Fibreboard Paper Products Corp.* v. *N.L.R.B.*, 379 U.S. 203 (1964). This being so, then the scope of the union's rights must be seen as coextensive with the scope of the employer's duty.

Applying this formula, where there is no duty to bargain at all—as in the situation between Connell and the Union herein—the union has no right to exert pressure on the employer to change either his labor policies or his methods of operation. Further, where there is an existent bargaining relationship between the parties, the union can lawfully compel commitments from the employer only insofar as the substance thereof is bargainable. Since decisions about materials and methods of operation which lie beyond the discretion of the subcontractor on the project would not fall within his collective bargaining authority, the union could not lawfully extract binding commitments from him regarding such matters.

A union's right to negotiate and enforce "work-preservation" agreements against a subcontractor would thus be held to extend only to work which is within the subcontractor's power to assign. To the extent such agreements were extended beyond those limits to reach work which never was nor would be within the subcontractor's power to give, the agreements and their enforcement

[13] See discussion in Judge Clark's dissenting opinion below (Pet. App. B-54-56).

would necessarily embody a prohibited secondary objective. Thus, the scope of the collective bargaining agreement would be seen as limited by the scope of the construction agreement. To hold otherwise would result in the conclusion that the subcontractor has the power to negotiate away not only his own rights, but also the rights of third parties—i.e., the right of the builders, architects and engineers to choose the materials and components for their projects.

Only the clear articulation by this Court of such a coherent antitrust-labor law standard for determining the proper extent of unions' jobsite powers can eliminate the confusion reflected in current Board and lower court decisions. The absence of such clear standards leads to constant overreaching by building trades unions to coerce the acceptance of agreements which serve, not to promote the legitimate interests of union members in the bargaining units affected, but merely to aggrandize the unions' power over ever-greater segments of the construction industry. As we have illustrated, the inevitable cost to the public resulting from such abuses comes not only in increased construction labor cost, but in arbitrary and counterproductive restrictions upon the materials, methods and components that can be used in construction. At a time when inflationary pressures, energy shortages and concerns for consumer safety heighten the importance of technological advances which promote productivity and efficiency in construction and enhance the quality and reliability of the end products thereof, union practices which result in such artificial restrictions cannot be tolerated.

CONCLUSION

For the foregoing reasons, the decision of the court below should be reversed.

Respectfully submitted

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No. 73-1256

In the Supreme Court of the United States

OCTOBER TERM, 1974

CONNELL CONSTRUCTION COMPANY, INC., PETITIONER

v.

PLUMBERS AND STEAMFITTERS LOCAL UNION NO. 100

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE NATIONAL LABOR RELATIONS BOARD AS AMICUS CURIAE

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CONNELL CONSTRUCTION COMPANY, INC., PETITIONER

v.

PLUMBERS AND STEAMFITTERS LOCAL UNION NO. 100

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE NATIONAL LABOR RELATIONS BOARD AS AMICUS CURIAE

INTEREST OF THE NATIONAL LABOR RELATIONS BOARD

The question presented is whether it is a violation of federal or state antitrust laws for a union, acting in pursuit of its own interests and not in furtherance of a conspiracy with a non-labor group, to enter into an agreement with a general contractor, whose employees the union does not represent, that the contractor will subcontract construction site work only to persons who have a collective bargaining agreement with the union. Since the Board regulates such subcontracting agreements pursuant to Section 8(e) of the National Labor Relations Act, 29 U.S.C. 158(e), the Board has a substantial interest in the question, the resolution of which will have an impact on national labor policy concerning an important segment of the economy.

STATEMENT

Connell is a general contractor in the construction industry in Texas (Pet. App. B-2). Connell's own employees are not members of, or represented by, respondent Union (Plumbers Local No. 100).[1] Connell contracts out the mechanical and plumbing work which is within the Union's jurisdiction, and it has, in the past, awarded such work equally to union and non-union subcontractors (Pet. App. B-3–B-4).

Early in 1971, the Union forced Connell, by peaceful picketing which caused a work stoppage at one of its projects, to enter into an agreement covering "mechanical work which the contractor does not perform with his own employees but uniformly subcontracts to other firms,"[2] and providing that, with respect to such work as is to be done "at the site of the construction," Connell would subcontract "only to firms that are parties to an executed, current, collective bargaining agreement with [the Union] * * * " (*id.* at B-2 n. 1, B-3).

Connell sued the Union, seeking a declaratory judgment that the agreement would violate the state and federal antitrust laws, and an injunction barring the Union from attempting to force Connell to enter into such an agreement (A. 25-34).[3] The amended complaint alleged that the agreement was unlawful because it restricted Connell's "right to contract or do business with firms or companies which do not have a binding collective bargaining agreement with the [Union] * * *" (A. 30).

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[1]Connell itself employs carpenters, cement finishers, iron workers, hoisting engineers, and laborers, and has collective bargaining agreements with the unions representing those crafts (A. 53).

[2]The agreement was aimed at future subcontracts, as the plumbing contractor on the picketed project had a collective bargaining agreement with the Union (Pet. App. B-3).

[3]Suit was originally filed in state court, alleging only a violation of the state antitrust laws (A. 3-17). The Union removed the case to the district court, which denied Connell's motion to remand (A. 35), and Connell amended the complaint to include a Sherman Act claim.

The district court concluded that the agreement was protected by the first proviso to Section 8(e) of the National Labor Relations Act, 29 U.S.C. 158(e) (discussed, *infra*, pp. 7-9), and that therefore it did not violate the antitrust laws (Pet. App. A-5—A-7). The court of appeals (Judge Clark dissenting (Pet. App. B-49—B-65)) affirmed, but on different grounds (Pet. App. B-1—B-49), and denied rehearing (Pet. App. B-66—B-67). From its reading of *United Mine Workers* v. *Pennington*, 381 U.S. 657, and *Meat Cutters Union* v. *Jewel Tea Co.*, 381 U.S. 676, the court of appeals concluded that labor union activities are exempt from the antitrust laws unless (1) there is a "conspiracy between labor and non-labor groups to injure the business of another non-labor group," or (2) the union's agreement reaches beyond a "legitimate union interest" (Pet. App. B-21). The court found that Connell had failed to satisfy either ground for removing the exemption.

The court noted that there was "no allegation of this union's participation in a scheme or conspiracy with a non-labor group to create a monopoly for that non-labor group," nor does "the proof allude to any such conspiracy;" rather, Connell, "the sole non-labor party to the agreement," bases "its claim on the ground that this contract simply restricts the way in which it is free to carry out its business" (*id.* at B-23). Moreover, the subcontracting agreement serves a "legitimate union interest" since it tends "to eliminate any edge that a non-unionized subcontractor has in bidding on a job when that competitive edge rests solely or primarily on the fact that he pays less wages or grants lower working standards than a unionized subcontractor" (*id.* at B-29). Nor, in the court's view, would the legitimacy of the Union's interest for

purposes of the antitrust laws be impaired if, as Connell alleged, the agreement violated Section 8(e) of the National Labor Relations Act;[4] if "the goal sought or the methods used in attempting to reach that goal violate the ground rules for labor relations set forth in the NLRA * * * punishment must come through the procedures and in the manner specified by Congress in the labor laws" (*id.* at B-36).

Judge Clark, dissenting, concluded that the agreement was not protected by the first proviso to, and thus violated, Section 8(e) of the National Labor Relations Act (*id.* at B-59—B-65), and stated that "whenever a union crosses the line separating protected activities from prohibited activities it sheds its cloak of total antitrust immunity" (*id.* at B-58—B-59).

DISCUSSION

1. In the instant case, the Union, through peaceful picketing, secured from Connell, a general contractor in the building and construction industry, a contract whereby Connell agreed not to subcontract plumbing and related work to be performed on construction sites except to firms that are party to a collective bargaining agreement with the Union. The court of appeals found, on the basis of substantial evidence, that the agreement was not the product of any conspiracy between labor and non-labor groups to create a monopoly for the latter, and that the Union was "simply seeking to eliminate competition based on differences in labor standards and wages" (Pet. App. B-28). On these findings the subcontracting agreement should be held, under the principles enunciated in

[4]The court of appeals thus found it unnecessary to decide whether the agreement violated Section 8(e) or was protected by the first proviso thereto (Pet. App. B-39—B-47).

Pennington and *Jewel Tea*, to be within the labor exemption to Section 1 of the Sherman Act, 15 U.S.C. 1.[5] Connell, and those supporting it, contend, however, that a different conclusion is warranted here because, they say, the agreement violates Section 8(e) of the National Labor Relations Act. The court of appeals properly rejected this contention.

2(a). In 1932, Congress enacted the Norris-LaGuardia Act, 47 Stat. 70, 29 U.S.C. 101, to overrule the holdings in *Duplex Printing Press Co.* v. *Deering*, 254 U.S. 443, 469-478, and *Bedford Cut Stone Co.* v. *Journeymen Stone Cutters' Ass'n*, 274 U.S. 37, that Section 20 of the Clayton Act, 38 Stat. 738, immunized from the Sherman Act only trade union activities directed against an employer by his own employees. "Congress abolished, for purposes of labor immunity, the distinction between primary activity between the 'immediate disputants' and secondary activity in which the employer disputants and the members of the union do not stand 'in the proximate relation of employer and employee . . . .' * * *" *National Woodwork Manufacturers* v. *National Labor Relations Board*, 386 U.S. 612, 623; see also *United States* v. *Hutcheson*, 312 U.S. 219, 231. In

[5]In *Pennington*, the Court reiterated that "the elimination of competition based on wages among the employers in the bargaining unit * * * is not the kind of restraint Congress intended the Sherman Act to proscribe." 381 U.S. at 664. But, it added, "a union forfeits its exemption from the antitrust laws when it is clearly shown that it has agreed with one set of employers to impose a certain wage scale on other bargaining units. One group of employers may not conspire to eliminate competitors from the industry and the union is liable with the employers if it becomes a party to the conspiracy." 381 U.S. at 665-666.

In *Jewel Tea*, the opinion of Mr. Justice White stated that "exemption for union-employer agreements is very much a matter of accommodating the coverage of the Sherman Act to the policy of the labor laws. * * * Thus the issue in this case is whether the marketing-hours restriction, like wages, and unlike prices, is so intimately related to wages, hours and working conditions that the unions' successful attempt to obtain that provision through bona fide, arm's-length bargaining in pursuit of their own labor union policies, and not at the behest of or in combination with nonlabor groups, falls within the protection of the national labor policy and is therefore exempt from the Sherman Act. We think that it is." 381 U.S. at 689-690 (footnote omitted).

1947 and 1959, when Congress proscribed union activities that it considered detrimental to the public good, it rejected "attempts to restrict or eliminate the labor exemption from the antitrust laws * * *;" rather, it made "unlawful certain specific union activities under the National Labor Relations Act."[6] *Jewel Tea, supra,* 381 U.S. at 707-708 (opinion of Goldberg, J.).

For example, Congress "curbed the secondary boycott in § 8(b)(4)(B) of the National Labor Relations Act, preserving from condemnation certain secondary activities deemed legitimate. The jurisdictional strike is regulated by § 8(b)(4)(D) in conjunction with § 10(k) of the Act. * * * Strikes and pressure by minority unions for organization or recognition are controlled by §§ 8(b)(4)(C) and 8(b)(7) of the Act. Union restrictions on contracting out and subcontracting of work are delineated by § 8(e) of the Act.* * * [I]n enacting this last prohibition, Congress * * * specifically excepted the unusual situations existing in the garment and building industries." *Id.* at 708-709 (footnotes omitted).

Moreover, Congress not only carefully delineated the union activities that it desired to proscribe, but it carefully selected the sanctions to be applied against such activities. It rejected efforts to give private parties the right to seek injunctive relief, entrusting that power only to the National Labor Relations Board and its General Counsel. See 29 U.S.C. 160(j) and (*l*); *Amazon Cotton Mill Co.* v. *Textile Workers Union*, 167 F. 2d 183 (C.A. 4). While it authorized private parties injured by certain union secondary activities to sue for damages (Section 303 of the Labor Management Relations Act, 29 U.S.C. 187), it "limited [the recovery] to actual, compensatory damages." *Teamsters Local 20* v. *Morton,*

[6]The pertinent legislative history is discussed in the brief of respondent Union (Resp. Br. 34-42).

377 U.S. 252, 260. Finally, as noted above, Congress specifically rejected proposals to subject the proscribed union activities to the antitrust laws and their sanctions.[7]

(b). Section 8(e) of the National Labor Relations Act, 29 U.S.C. 158(e), provides:

> It shall be an unfair labor practice for any labor organization and any employer to enter into any contract or agreement, express or implied, whereby such employer ceases or refrains or agrees to cease or refrain from handling, using, selling, transporting or otherwise dealing in any of the products of any other employer, or to cease doing business with any other person, and any contract or agreement entered into heretofore or hereafter containing such an agreement shall be to such extent unenforcible and void * * * .

The first proviso excepts from the ban of Section 8(e):

> an agreement between a labor organization and an employer in the construction industry relating to the contracting or subcontracting of work to be done at the site of the construction, alteration, painting, or repair of a building, structure, or other work * * *.[8]

[7]The Court's statement in *National Woodwork, supra,* 386 U.S. at 632, that "Congress, in enacting §8(b)(4)(A) of the [Taft Hartley] Act, returned to the regime of *Duplex Printing Press Co.* and *Bedford Cut Stone Co.* * * *," is not inconsistent with the foregoing analysis. A reading of the Court's opinion as a whole makes plain that it meant, not that Congress had restored antitrust sanctions for secondary boycott activity, but that it had subjected it to regulation under the National Labor Relations Act and the Labor Management Relations Act. See 386 U.S. at 623-644; *id.* at 652-663 (Stewart, J. dissenting).

[8]A second proviso excepts similar agreements in the apparel and clothing industry.

Section 8(b)(4)(A) of the National Labor Relations Act, 29 U.S.C. 158(b)(4)(A), makes it an unfair labor practice for a labor organization to force an employer to enter into any agreement that is prohibited by Section 8(e). Accordingly, economic pressure to obtain an agreement barred by Section 8(e) would be unlawful, but such pressure to obtain an agreement protected by the construction industry proviso would not. Economic pressure to enforce the latter as well as the former type agreement would, however, violate Section 8(b)(4)(B) of the Act, 29 U.S.C. 158(b)(4)(B), which makes it an unfair labor practice for a labor organization to engage in economic pressure for an object of forcing a neutral employer to cease doing business with the employer with whom the labor organization has its primary dispute. See *Orange Belt District Council* v. *National Labor Relations Board*, 328 F. 2d 534, 537 (C. A. D.C.); *Construction Laborers Union, Local 383* v. *National Labor Relations Board*, 323 F. 2d 422, 425 (C. A. 9); *Essex County District Council of Carpenters* v. *National Labor Relations Board*, 332 F. 2d 636, 641 (C. A. 3); *Northeastern Indiana Bldg. Trades Council*, 148 NLRB 854, enforcement denied on other grounds, 352 F. 2d 696 (C.A. D.C.).

The agreement about which Connell complains, which limits the persons to whom it can subcontract plumbing and related work, is either prohibited by Section 8(e) of the National Labor Relations Act or protected by the construction industry proviso thereto.[9] If the former,

[9]There is no question that Connell is "in the construction industry" and that the agreement which it entered into with the Union relates to "contracting or subcontracting of work to be done at the site of the construction." Accordingly, the agreement would clearly come within the first proviso to Section 8(e) (*supra*, p. 7), unless, as Connell contends, it is not an "employer" within the proviso because it neither has a collective bargaining relation with the Union nor employs any employees who perform work covered by the agreement.

the Board would have power only to seek a temporary injunction and to enter an appropriate remedial order. In addition, Connell could sue for actual damages under Section 303 of the Labor Management Relations Act. If, on the other hand, the agreement were protected by the construction industry proviso to Section 8(e), Connell would be entitled to no remedy under either statute.

(c) It is unnecessary to determine whether the agreement here violates Section 8(e) or is protected by the construction industry proviso thereto.[10] As the

[10]The Board has not considered that question. But see *Joint Bd. of Garment Workers*, 212 NLRB No. 106, 86 LRRM 1651, 1653-1654 (Resp. Br. 26, n. 6). However, the General Counsel of the Board has refused to issue complaints on charges challenging the validity of subcontracting agreements obtained from general contractors who, like Connell, do not employ any employees represented by the union (Pet. Br. 9; Resp. Br. App. 1a-33a). The General Counsel's reasons are set forth in a public statement (*id.* at 2a-33a). The statement notes, *inter alia*, that "'Congress intended by means of Section 8(e) to preserve the status quo of bargaining in the construction industry • • •'" (*id.* at 32a, quoting *Dallas Building Trades Council* v. *National Labor Relations Board*, 396 F. 2d 677, 682 (C.A. D.C.)); that "organizing in the building and construction industry both prior to and subsequent to the 1959 amendments [to the Act], was and is primarily carried on by building and construction trades councils on behalf of their constituent craft locals" (*id.* at 31a); and that the "agreements proffered are not conventional collective-bargaining agreements, nor is a conventional collective-bargaining relationship sought, but rather an attempt is made to obtain skeleton agreements (containing little more than subcontracting provisions) which in turn are augmented by the execution of collective-bargaining agreements by the individual trade unions, the latter agreements containing provisions governing wages and other substantive conditions of employment" (*id.* at 31a-32a; footnote omitted).

court below correctly concluded, in either case the application of antitrust sanctions would upset Congress' judgment as to "how the balance of interest between labor and management is to be struck in the public interest" (Pet. App. B-34). "It is relevant to recall that the Taft-Hartley Act was, to a marked degree, the result of conflict and compromise between strong contending forces and deeply held views on the role of organized labor in the free economic life of the Nation and the appropriate balance to be struck between the uncontrolled power of management and labor to further their respective interests." *Local 1976, Carpenters* v. *National Labor Relations Board*, 357 U.S. 93, 99-100. This fact "counsels wariness in finding by [judicial] construction" *(id.* at 100) proscriptions or sanctions that Congress did not explicitly provide, and indeed deliberately rejected. See *National Woodwork, supra*, 386 U.S. at 619-620; *Morton, supra*, 377 U.S. at 259-260; *Suburban Tile Center, Inc.* v. *Rockford Bldg. Trades Council*, 354 F. 2d 1, (C.A. 7), certiorari denied, 384 U.S. 960.

As an integral part of the statutory scheme for protecting the rights and duties conferred by the National Labor Relations Act, Congress gave the General Counsel "final authority, on behalf of the Board," to determine whether an unfair labor practice charge merits prosecution before the Board. Section 3(d), 29 U.S.C. 153(d). Where, as here, after investigation of the charge and analysis of the applicable Board and judicial precedents, the General Counsel concludes that there is not reasonable cause to believe that an unfair labor practice has been committed, and fully explains his refusal to proceed, his action defines "• • • 'the nature of the activity with unclouded legal significance.' " *Hanna Mining Co.* v. *District 2, Marine Engineers*, 382 U.S. 181, 191-192.

3. Finally, the test proposed by Connell and the dissenting judge below—which makes compatibility with the National Labor Relations Act the touchstone for determining the applicability of the Sherman Act to union activity—is unlikely to advance the goal of open competition which the latter statute is intended to promote.[11] Thus, under that test, the subcontracting agreement would have been lawful under the construction industry proviso to Section 8(e)—and hence lawful under the Sherman Act—if Connell had employed some employees performing work within the Union's jurisdiction. Yet the anticompetitive effects of the agreement in such a case would be substantially the same as they are where the general contractor does not employ such employees, *i.e.*, restriction of his ability to hire lower-priced non-union subcontractors, with resulting pressure on such subcontractors to unionize and give up their labor cost advantages (see Pet. App. B-32). The proposed test is not an appropriate basis for determining the applicability of the Sherman Act.[12]

---

[11]Indeed, this Court has already recognized that the mere fact that union conduct may constitute an unfair labor practice under the National Labor Relations Act does not render it illegal under the Sherman Act. In *American Federation of Musicians* v. *Carroll*, 391 U.S. 99, in light of the district court's findings that "the orchestra leaders performed work and functions which actually or potentially affected the hours, wages, job security, and working conditions of petitioners' members" *(id.* at 106), the Court held that "it was lawful for petitioners to pressure the orchestra leaders to become union members, • • • to insist upon a closed shop, • • • [and] to refuse to bargain collectively with the leaders • • •." *Id.* at 106-107. The latter two actions would violate Section 8(b) (2) and (3) of the National Labor Relations Act, 29 U.S.C. 158(b)(2) and (3).

[12]If, as we have shown, the application of the Sherman Act here would be contrary to the regulatory scheme that Congress has fashioned in the National Labor Relations Act, it follows that the application of state antitrust laws would also be foreclosed. See *Teamsters Union* v. *Oliver*, 358 U.S. 283, 295-297.

CONCLUSION

For the reasons set forth above, the judgment of the court of appeals should be affirmed.

Respectfully submitted,

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In the

Supreme Court of the United States

OCTOBER TERM, 1973

NO. 73-1256

CONNELL CONSTRUCTION COMPANY, INC.
Petitioner,

v.

PLUMBERS AND STEAMFITTERS LOCAL UNION NO. 100, ETC.
Respondent.

On Writ of Certiorari to the United States Court of Appeals
For the Fifth Circuit

PETITIONER'S REPLY BRIEF

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PETITIONER'S REPLY BRIEF

UNION'S ATTEMPT TO CONFUSE THE NATURE OF THE SUBJECT AGREEMENT

Both Respondent (UNION) and its Amicus (AFL-CIO) seek to cloud the nature of the subject agreement[1] by asserting that UNION was only trying to protect wage scales and reduce competition based on wages. AFL-CIO quotes the erroneous statement of the Court of Appeals to the effect that unions have succeeded in eliminating competition based on lower wage scales (AFL-CIO Br. p. 2). UNION also attempts to catagorize the subject Agreement as a wage protective agreement by referring to self-serving language in UNION's standard forwarding letter sent with the sub-

[1] The term "subject agreement" refers to the boycott agreement between UNION and CONNELL (Pl. Exb. 4, A. 62, 114) — not to any collective bargaining agreement.

ject agreement (Pl. Exb. 2, A. 110), (Resp. Br. 3). These statements regarding elimination of competition based on wages are not supported by the record which is void of any evidence on the wage scales of those mechanical contractors UNION has forced CONNELL to boycott. However, UNION's Business Agent, Patterson, testified that he had been unsuccessful in organizing Texas Distributors' a mechanical firm with whom CONNELL had done business (A. 52-3, 108). Presumably the employees of Texas Distributors preferred their wages to those offered by UNION. Some mechanical firms without a collective bargaining agreement with UNION may well pay their employees more than UNION's wage scale. In fact, UNION's MASTER AREA AGREEMENT prevents employers from paying in excess of the established union scale.

UNION's argument that the subject agreement is simply to eliminate competition based on wage scales makes a mockery of the concept of legitimate union interests. If UNION's argument succeeds in this case, then any future union activity, no matter how destructive of employee's rights and the distinction between employers as established by this Court in *Denver Building Trades Council v. NLRB*, 341 U.S. 675 (1951), and regardless of the extent of restraint of trade[2], can be justified merely by the unsupported and unrealistic claim of ultimate goals without regard to the manner in which these goals are accomplished and their impact upon employees, employers and the public. It would also result in complete destruction of the careful balance between labor and anti-trust legislation established by this Court and Congress over the years.

UNION's goal is clear. It is not to eliminate competition based on wages; it is to cut out of the construction market those mechanical firms which UNION is either unable, or its

[2] See Brief of Air-Conditioning and Refrigeration Institute, et al, Amici, at pp. 13-20, and *Local 636, United Ass'n v. NLRB*, 430 F. 2d. 906 (D.C. Cir. 1970).

agents are too lazy to organize by the methods allowed by the National Labor Relations Act (NLRA). For whatever reasons UNION has failed to organize the employees of some mechanical contractors, it has skipped the employer-employee relationship and forced general contractors to boycott not some, but all firms from Dallas to the Oklahoma border who are not parties to its MASTER AGREEMENT. If any plumbing contractor refuses to acquiesce to the dictated terms of UNION, he is denied the right to do business with CONNELL and other general contractors who have agreed with UNION to boycott, regardless of the wishes of the employees affected by the boycott.

A key factor in the subject agreement which goes to both labor and anti-trust issues is the total lack of an employer-employee relationship. Both UNION and AFL-CIO evade this central issue. For example, UNION makes the bold statement that the facts of this case are indistinguishable from those in *Suburban Tile Center v. Rockford Bldg. Trades Council*, 354 F. 2d 1 (7th Cir. 1965) (Resp. Br. p. 5). After quoting extensively from *Suburban Tile* at pages 29-32 of its Brief, UNION itself quotes the distinguishing factor between this case and *Suburban*, stating:

> "The Seventh Circuit rejected that anti-trust claim because:
>
> > 'A construction subcontracting agreement has been held to be a mandatory subject of collective bargaining.'" (Resp. Br. p. 31, quoting from 354 F. 2d 3).

The distinguishing factor in *Suburban* is, of course, the collective bargaining relationship, which is totally absent in this case.

On the issue of the construction industry proviso to § 8(e) of the NLRA, UNION favors and advances the Third Circuit opinion in *Essex County Carpenters v. NLRB*, 332 F. 2d 636 (3rd Cir. 1964), which also involved the employer-employee relationship. The entire dispute in *Essex* arose out of negotiations for a new collective bargaining agree-

ment. If there had been no basis for collective bargaining in *Essex*, and had the case involved antitrust allegations, the Third Circuit would have held that the union forfeited its antitrust immunity.

In fact, on July 2, 1974, in *Conley Motor Express, Inc. v. Russel, et al*, 500 F. 2d. 124 (3rd Cir. 1974), the Third Circuit considered the issue of picketing by the Fraternal Association of Steelhaulers (FASH) outside of any employer-employee relationship. One question in that case was whether or not FASH was a labor organization and was thus exempt from the anti-trust laws. The Third Circuit stated:

> "Even assuming arguendo that FASH is a labor organization' and appellants are seeking traditional labor objectives, *appellants have nonetheless not shown the preliminary requisite for exemption from the anti-trust laws, i.e., that their dispute with Conley involves an employer-employee relationship.*" 500 F. 2d 126 (emphasis added).

After analyzing the pertinent provisions of the Clayton and Norris-LaGuardia Acts, the Third Circuit found no anti-trust immunity for FASH, concluding:

> "Regardless of how appellants may seek to characterize their objectives in picketing, *appellants have failed to show that the employer-employee relationship forms the matrix of their controversy with Conley*. Therefore, we are satisfied that the district court did not abuse its discretion in granting the preliminary injunction." 500 F. 2d. 127 (emphasis added).

UNION seeks to further confuse the Court as to the "intent of Congress concerning the subject agreement by contending that such agreements were commonplace in the construction industry prior to 1959 when § 8(e) was added to the NLRA.

By Order dated February 22, 1973, the Court of Appeals below directed counsel for all parties, including Amici Associated General Contractors and the AFL-CIO Building Trades Department, which represented all of its various affiliated International Building Trade Unions throughout

the United States "to file simultaneous memorandums pointing out all relevant sources of information which would disclose the bargaining practices being followed in the construction industry concerning the subcontractor agreements where the union seeking the agreement *did not have or seek a collective bargaining agreement* with the general contractor, as of the date that the Labor-Management Reporting and Disclosure Act of 1959 P. L. 86-257 was adopted." (emphasis added.).

In response to this Order, neither CONNELL, UNION, nor Amici could furnish the Court with a single instance in which the type of subcontractor agreement involved herein had been used or was in existence prior to such 1959 amendments.

Indeed, Judge Clark, in his dissenting opinion, specifically stated:

> "This court requested supplemental briefs from all the parties and Amici as to the pattern of bargaining practices utilized in the industry prior to the Landrum-Griffin amendments in 1959. *In response to this specific inquiry the union was unable to point out any source of information which would show that subcontractor contracts such as the one in this case were even occasionally utilized in the industry prior to 1959*, muchless so common a practice that we could assume Congress intended to preserve that part of the pattern of collective bargaining in the industry.
>
> In light of the total lack of any evidence to support the proposition that Congress intended to exempt this wideranging type of secondary behavior from the general rules, and considering the probable harm of extensive picketing of neutral parties by various, possibly, rival, locals for the purpose of securing recognition of bargaining status from virtually all subcontractors in a given area, I feel compelled to reach the conclusion that this conduct is not protected by the proviso." 483 F. 2d. 1182 (emphasis added).

UNION asks this Court, although it could furnish no evidence of the existence of any such agreements when so ordered by the Court below, to find that certain unidentified, undefined and unproduced subcontractor agreements, which may or may not have resulted from a collective bargaining relationship, show a pattern of bargaining for agreements of the kind involved herein prior to the 1959 amendments. CONNELL urges that Judge Clark's finding is correct. Any other finding would be based on untested hearsay evidence outside the record of this case.

UNION goes so far as to quote a statement of the General Counsel of the National Labor Relations Board wherein the General Counsel quotes from the case of *Dallas Building Trades Council v. NLRB*, 396 F. 2d. 677 (D. C. Cir. 1968) at page 682, the following:

> "* * * Congress intended by means of Section 8(e) to preserve the status quo of bargaining in the construction industry; and, in 1959 'umbrella' agreements like the one proposed here were, as they are today, commonplace, for collective bargaining is traditionally conducted at several levels in the construction industry * * *" (Resp. Br. pp. 25-26).

A reading of the *Dallas Building Trades* opinion reveals that this statement relied on by the General Counsel is nothing more than a statement of the Trades Council's argument by the D.C. Circuirt Court. The paragraph from which the General Counsel draws his reliance begins:

> "The Council's principal argument is * * *"[3]

UNION further attempts to evade and confuse the lack of a collective bargaining relationship by quoting out of context a sentence of Senator McNamara that the proviso covers all forms of contracting and subcontracting clauses in agreements between building and construction contractors and building trades unions (Resp. Br. p. 27). The very paragraph

[3] This error of the NLRB General Counsel is only a minor example of the brittle logic contained in his Memorandum attached as Appendix A to Resp.'s Brief. The Memorandum is discussed infra at pp. 9-10 and in Appendix A to this Reply Brief.

from which UNION places reliance and lifts one sentence ends with the following sentence:

> "This is all a question to be covered by the collective bargaining agreement." II Leg. Hist. 1959, 1815 [4]

UNION also seeks to evade the consequences of the MASTER AGEEEMENT's favored nations clause by contending that issue is moot because the clause was dropped in 1973 negotiations (Resp. Br. 10, fn. 3). This clause has been in UNION's collective bargaining agreements for many years prior to the time CONNELL was made a vehicle for transmitting it to mechanical contractors. The illegal clause existed at the time UNION commenced its actions herein and also at the time of trial in a subsequent MASTER AGREEMENT. UNION's longstanding "favored nations" agreement with the local multiemployer group was not dropped until after this case had been argued and submitted to the Court of Appeals. UNION's dropping of the favored nations clause is mere "window dressing" and an attempt to advance form over substance, for UNION still has and will execute only one form of collective bargaining agreement with mechanical contractors. UNION's Business Agent testified at the trial of this case that UNION would not vary the terms of its established MASTER AREA AGREEMENT (A 73-74). The issue is not moot. The restraint of trade continues outside of any employer-employee relationship, and the lack of any possible legitimate union interest prevails in spite of the attempts of UNION and AFL-CIO to write around the nature of the subject agreement.

[4] See also remarks of Congressman Thompson discussing the same questions wherein he concludes:

> "This is all a question to be covered by the collective bargaining agreement." II Leg. Hist. 1959, 1816

These statements of the proponents of the proviso after its enactment as well as the entire legislative history of the 8(e) proviso compel the finding that it was only to apply within the context of a collective bargaining relationship.

II.

UNION'S MISCONSTRUCTION OF THE § 8(E) PROVISIO OF THE NLRA

UNION admits that this antitrust case turns on the meaning of the NLRA (Resp. Br. p. 11), and advances its defense that the agreement is lawful under the construction industry proviso to § 8(e). (Of course the entire NLRA must be examined to determine whether or not UNION's actions are legitimate interests.)

CONNELL's position on the § 8(e) proviso is set forth in its Brief on the Merits at pages 33-43;[5] however, limited response is made to UNION's misconstruction of the proviso.

UNION correctly states that various circuit courts rejected the NLRB's unanimous position[6] that picketing was not to be allowed in obtaining an 8(e) agreement in the construction industry. It is respectfully submitted that these circuit courts ignored the legislative history on the proviso, as well as the meaning of this Court's *Sand Door*[7] decision.

The authority relied on by UNION (Resp. Br. p. 15) begins with the Ninth Circuit reversal of the NLRB's *Colson & Stevens* decision in *Construction, Production & Maintenance Laborers Union v. NLRB*, 323 F. 2d 422 (9th Cir. 1963). That decision reveals a lack of review of the applicable legislative history. Unfortunately the error of that decision was relied on by the Third Circuit in *Essex County Carpenters*, supra, which decision also lacks a discussion of the legislative history of the proviso. Thereafter the various circuit courts cited each other, and the error of allowing coercion to obtain a hot cargo clause was perpetrated until the NLRB gave in and reversed its well reasoned *Colson & Stevens* decision in *Centlivre Village Apartments*, 148 NLRB 854 (1964), prior to this Court's examination of the issue.

[5] See also Amici AGC Brief at pp. 27-41 and Amicus U.S. Chamber Brief at pp. 19-33.

[6] *Colson & Stevens Construction Co.*, 137 NLRB 1650 (1962).

[7] *United Brotherhood of Carpenters v. NLRB*, 357 U.S. 93 (1958). This case sanctioned a voluntary boycott if it arose in a collective bargaining relationship. The purpose of the proviso was to retain only this right for construction unions.

The NLRB's erroneous decision in *Centlivre* then becomes UNION's building block as well as that of the General Counsel (App. A to Resp. Br.); however, the NLRB did *not* pass on the legality of the clause in that case as the Board stated in footnote 11 at 148 NLRB 856.

However, even if coercion should be allowed to obtain a hot cargo agreement, the § 8(e) proviso only applies within an employer-employee relationship, as set forth in CONNELL's Brief at pages 36-43. UNION, unable to cite authority to the contrary, resorts to confusion by citing a limited sentence of the D.C. Circuit opinion in *Dallas Bldg. and Const. Trades Council v. NLRB*, supra, that "picketing is permissible if the coverage of the proposed contract is limited to the type of work which is never performed by the general contractor's own employees". (Resp. Br. p. 24). The quoted language is *obiter dictum* from footnote 8 to the Court's Opinion. 396 F. 2d at 682, fn. 8.

UNION then relies on the NLRB General Counsel's refusal to issue a Complaint in *Hagler Construction Company*, NLRB Case No. 16-CC-447, (App A to Resp. Br.) Actually the same decision of the General Counsel was rendered in several companion cases, including *Ponsford Brothers*, NLRB Case Nos. 28-CC-417, 28-CC-431 and 28-CE-12.

Although the General Counsel's Memorandum is one man's self-serving statement to justify his refusal to act, CONNELL has no objection to its being submitted by UNION. Indeed this decision is the best reason why this Court should decide the § 8(e) questions involved in this case.

After taking the appeals in *Hagler* and *Ponsford* under advisement for twenty (20) months, and after the Petition for Certiorari was filed herein, the General Counsel finally refused to issue Complaints in those cases. In spite of the well reasoned dissent of Justice Clark[8] and a strong plea from

the majority of the Court of Appeals below, the General Counsel has, in effect, said:

> The Fifth Circuit has misread the law; I have decided that there is no need for the Board and the Courts to judge these issues on a fully developed record; I have spoken and my action is unreviewable by any court in the land.

In addition to the arguments contained in the Briefs of CONNELL and Amici which reveal the fallacy of the General Counsel's legal position, CONNELL attaches hereto as Appendix "A"[*] an excellent article written by Messrs. Leonard S. Janofsky and Andrew C. Peterson in response to the NLRB General Counsel's decision. This article reveals how the General Counsel has overruled this Court's decision in *Denver Bldg. Trades*, 341 U.S. 675, as well as others.

III.

ANTITRUST LAWS AND REMEDIES ARE NOT PREEMPTED BY SECTION 303

UNION, in its Brief, contends (for the first time in this case) that Section 303 of the NLRA is the exclusive remedy available to any person seeking relief from the effects of illegal secondary union activity (Resp. Br. pp. 34-43). UNION's theory that Congress intended for the NLRA to be the exclusive means of regulating all union secondary activity is in direct conflict with the basic rules of statutory construction. As this Court stated long ago in *U.S. v. Borden Co.*, 308 U.S. 188 (1939):

> "It is not sufficient, as was said by Mr. Justice Story in Wood v. United States, 16 Pet. 342, 362, 363, 10 L. Ed. 987, 'to establish that subsequent laws cover some or

[*] Justice Clark's interpretation of the 8(e) proviso is found at 483 F. 2d 1180-1182.

[*] THE EXERCISE OF UNREVIEWED ADMINISTRATIVE DISCRETION TO REVERSE THE UNITED STATES SUPREME COURT, to be published in 25 CCH LABOR LAW JOURNAL, No. 12 (Dec. 1974).

> even all of the cases provided for by [the prior act]; for they may be merely affirmative, or cumulative, or auxiliary.' There must be 'a positive repugnance between the provisions of the new law and those of the old; and even then, the old law is repealed by implication only, pro tanto, to the extent of the repugnancy.'" Id at 198-199.

See also *Silver v. New York Stock Exchange*, 373 U. S. 341 (1963); *California v. Federal Power Comm.*, 369 U. S. 482 (1962); *Georgia v. Pennsylvania* R.R. Co., 324 U. S. 439 (1945). These cases show one very clear rule that is applicable in this case, i.e., UNLESS CONGRESS EXPRESSES ITS CLEAR INTENT TO LIMIT REGULATION OF AN ACTIVITY TO ONE STATUTORY SCHEME, THEN NO SUCH INTENT WILL BE IMPLIED.

Thus, the proper question on this issue is not whether Congress intended to regulate secondary activity under the NLRA, but, rather, did Congress, in doing so, intend to repeal the antitrust laws as to secondary activity if that activity violates the Sherman Act. CONNELL submits that nothing in either the labor statutes or their legislative history demonstrates such Congressional intent. In fact, the legislative history, including that quoted by UNION, shows the clear intent of Congress to maintain the qualified immunity from antitrust laws rather than remove it entirely. Instead of removing all antitrust immunity for any union secondary activity, which in most cases would have been killing a fly with a sledgehammer, Congress established a more practical system of regulation. But Congress left intact the concept that union activity, including secondary, would become subject to antitrust regulation if a union overstepped the bounds of its legitimate labor interests or conspired with a non-labor party, such as CONNELL, to violate the Sherman Act.

The point is reinforced when it is noted that secondary activity is only one of many union activities defined and regulated as unfair labor practices in the NLRA. Also, just

as with secondary activity, Congress has provided both administrative and other remedies for those unfair labor practices. The provision of those remedies, however, has never been interpreted to immunize the activities of unions or employers or any other person or entity from other federal or state laws merely because they were regulated by the NLRA.

The failure of a union to fairly represent employees is one example of such condemned activity. The fact that specific remedies are established in the NLRA, however, does not serve to immunize a union from suit and liability under various Federal Civil Rights statutes against discrimination. See, e.g., *Alexander v. Gardner-Denver Co.*, U.S. , 94 S. Ct. 1011 (1974). It is also noteworthy that the contract condemned in *United Mine Workers v. Pennington*, 381 U.S. 657 (1965), was a collective bargaining agreement which is heavily shielded by the NLRA. That fact, however, did not serve to shield that agreement from antitrust laws.

UNION relies heavily on this Court's decision in *Local 20, Teamsters, etc. Union v. Morton*, 377 U.S. 252 (1964) (Resp. Br. p. 20). CONNELL does not dispute the validity of the *Morton* decision, but does submit that it has no application in this case and, in any event, UNION's interpretation of that decision is overbroad.

The first and most significant point to consider as to *Morton* is that there was no issue of antitrust violation involved in the case. *Morton* involved what might be termed "garden variety" secondary activity and a question of the damages normally flowing from such commonplace secondary activity. The case now before this Court, however, does not deal with such matters. Rather, this case involves violations of the antitrust laws by union activity that far exceeds the normal bounds of secondary activity which was within the contemplation of Congress when it enacted § 303. Were the basic issue before this Court a question of whether UNION was engaged in secondary activity, then *Morton* might have some application. The issue however, is whether UNION has so overstepped the bounds of legitimate union activity as to violate state and federal antitrust laws, and CONNELL

seeks relief from those antitrust violations and not from ordinary secondary activity.

Even if *Morton* did have some place in the consideration of this case, it certainly would not support UNION's theory that § 303 has totally preempted the field of secondary activity. Indeed, this theory has been specifically rejected. In the case of *Price v. United Mine Workers*, 336 F. 2d 771 (6th Cir. 1964), cert. den. 380 U.S. 913 (1965), the issue was raised in the context of whether state laws giving rights of recovery for personal and other injuries flowing from secondary activity were preempted by § 303. After reviewing the *Morton* decision, the court in *Price*, held that § 303 is applicable *only* when money damages to business or property flowing from peaceful illegal secondary activity are sought. See also *Gulf Coast Bldg. & Const. Trades Council v. F. R. Hoar & Son, Inc.*, 370 F. 2d 746 (6th Cir. 1967).

The very nature of § 303 argues against UNION's position. § 303 is strictly compensatory in nature and has no regulatory aspect or coverage. See, e.g. *Landstrom v. Teamsters Local Union No. 65*, 476 F. 2d 1189 (2nd Cir. 1973); *Iodice v. Calabrese*, 345 F. Supp. 248 (D.C.N.Y. 1972); *Local 20, Teamsters, etc. Union v. Morton*, supra. To say that Congress outlawed an activity and then proceeded to cut off all civil remedies except compensatory damages against unions only is obviously ridiculous. *United Mine Workers v. Laburnum Corp.*, 356 U.S. 634 (1954). It is equally ridiculous to say, as does UNION, that by enacting § 303, Congress intended to protect unions from ruinous damage awards and yet intended to deny a party any right of action which could prevent those damages from being incurred in the first place. Also, to adopt UNION's theory would be to say that if union secondary activity violated antitrust or other laws, the offending union would be immune while other participants, no matter how involved, would be left to bear the burden of those other laws. In this case, for example, UNION says it can force CONNELL to violate both State and Federal antitrust laws, deny CONNELL any right of action to protect itself, and then UNION escapes while CONNELL

is left to bear any and all punishment. CONNELL submits that Congress could not have intended such a result.

IV.

STATE ANTITRUST ISSUES

UNION takes the position that State Antitrust laws, or, for that matter, any state law, cannot be applied in this case for the reason that a labor union and labor issues are involved. This position is contrary to past decisions of this Court on the preemption doctrine. As this Court and other Federal Courts have consistently held, state laws are subject to preemption *only* when those laws are in real and direct conflict with particular federal legislation, or where, in a particular case, the application of state law would defeat or negate federally protected rights. See, *Watson v. Buck*, 313 U.S. 387 (1941); *Giboney v. Empire Storage & Ice Co.*, 336 U.S. 490 (1949); *Hanna Mining Co. v. Marine Engineers Beneficial Ass'n., Dist. 2*, 382 U.S. 181 (1965). The very case relied on so much by UNION, *Teamsters Local 34 v. Oliver*, 358 U.S. 283 (1959), is in fact very clear on this point. Throughout the decision in that case, the Court spoke of the preemption of state law *only when it was inconsistent* with federal law.

Of much greater interest is the fact that UNION, in its Brief, completely ignored this Court's decision in *Hanna Mining Company v. Marine Engineers*, supra. CONNELL submits that the *Hanna* case is not only much closer to the facts in this case than is *Oliver*, but is truly dispositive of the preemption issue. The key point is that in *Hanna* this Court ruled that the preemption doctrine did not protect a labor union's activities from state law when those activities did not involve an employer-employee relationship. Precisely the same situation is now before the Court. The UNION'S smokescreen of union goals elsewhere does not offset the fact that there are no employees, no wages, hours nor working conditions involved in this case. Under such circumstances state law should not be preempted because

it does not interfere with an activity protected by federal law and is not inconsistent with any federal law.

CONCLUSION

CONNELL is not asking this Court to rule that all secondary activity violates state and federal antitrust laws or that every union engaged in such activity loses its antitrust protection under the Norris-LaGuardia and Clayton Act. CONNELL does, however, submit that the secondary activity inherent in this case goes far beyond what might be considered "normal" or "commonplace" secondary activity and is, in fact and in law, so flagrant, widespread and misdirected that it is wholly outside the realm of normal labor management relations and is really destructive of the very balance Congress and the Courts have established between labor and management and between labor and antitrust laws.

Unions generally become involved in improper secondary activity as an adjunct to an active labor dispute involving employers and employees. In such cases there is a realistic union interest to protect unions from the antitrust laws and the regulatory process of the NLRA acts most effectively to protect neutral employers. UNION is not acting here to further its legitimate interests and it is not acting to protect any of its rights as established by federal labor legislation; instead, UNION is acting to avoid the legal obligations imposed on all labor organizations by federal law and, also, to avoid the legal rights of employers and employees as established by such laws.

Respectfully submitted,

Joseph F. Canterbury, Jr.
Counsel for Petitioner

OF COUNSEL:
SMITH SMITH DUNLAP & CANTERBURY
BOWEN L. FLORSHEIM
On the Brief

CERTIFICATE OF SERVICE

This is to certify that on the 7th day of November, 1974, three true and correct copies of the foregoing Petitioner's Reply Brief were served on Counsel for Respondent by depositing the same in the United States Mail, with First Class postage prepaid, and addressed to Mr. David R. Richards, 600 West 7th Street, Austin, Texas 78701.

Joseph F. Canterbury

APPENDIX "A"

THE EXERCISE OF UNREVIEWED ADMINISTRATIVE DISCRETION TO REVERSE THE UNITED STATES SUPREME COURT

(PONSFORD BROTHERS)

Leonard S. Janofsky*
Andrew C. Peterson*

Often the greatest discretionary power is the power to do nothing. When administrative agencies exercise this power without judicial check, important private interests cannot be protected against arbitrary determinations. Such was the case when the General Counsel of the National Labor Relations Board (hereinafter the "Board") recently refused to issue complaints in several similar cases alleging violations of the "hot cargo" provisions of the National Labor Relations Act, as amended (hereinafter the "Act"), 49 Stat. 449, as amended by 61 Stat. 136 and 73 Stat. 519, 29 U.S.C. §§ 141, et seq.[1]

In *Ponsford*, Sheet Metal Workers International Association, Local 188 (hereinafter "Local 188") picketed Ponsford, an employer in the construction industry, for the purpose of forcing Ponsford to sign a subcontracting agreement providing for all sheet metal construction work to be subcontracted only to employers having a collective bargaining agreement with it. Ponsford, although employing carpenters represented by the Carpenters Union, *employed no employees in the sheet metal trade*, and there was *no collective bargaining relationship between Ponsford and Local 188*. Thus, the sole purpose of Local 188 is laid bare: to force Ponsford, outside the context of a collective bargaining relationship, to cease doing business with nonunion contractors generally.

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* Member of the California Bar.

[1] *Ponsford Brothers*, N.L.R.B. Case Nos. 28-CC-417, 28-CC-431, 28-CE-12; *Hagler Construction Co.*, N.L.R.B. Case No. 10-CC-447; *Howard U. Freeman, Inc.*, N.L.R.B. Case No. 16-CC-477; *Columbus Building Trades Council*, N.L.R.B. Case No. 9-CC-706.

The General Counsel's decision is set forth as the First Installment of the General Counsel's Report for the Period Ending March 31, 1974, released July 2, 1974.

We believe the General Counsel's decision is erroneous for the following reasons:

(1) He has arguably overruled, at least in practical effect, the Supreme Court's decision in *N.L.R.B. v. Denver Building and Construction Trades Council*, 341 U.S. 675 (1951);

(2) He has overlooked that portion of the legislative history on the proviso to section 8(e) which conclusively establishes that *Denver Building Trades* was to remain good law;

(3) He has destroyed the distinction established by the legislature between the construction industry and garment industry provisos; and

(4) Contrary to the stated policy of the Office of the General Counsel, he has effected these sweeping changes by administrative fiat without allowing the issue to be decided with the benefit of the expertise of the Board or review by the courts.

A. The Denver Building Trades Case

Section 8(e) was enacted in 1959 to outlaw "hot cargo" agreements, contracts whereby an employer agreed to deal only with other employers signatory to a union contract. The section contains a partial exemption from its proscriptions for the construction and garment industries.[2] The impetus for the first proviso, the construction industry proviso, was the 1951 Supreme Court decision, *N.L.R.B. v. Denver Building and Construction Trades Council*, 341 U.S. 675 (1951). This case involved a typical situation where a union picketed a general contractor because it wanted to represent the employees of a subcontractor engaged on the same construction project. The Court held that picketing at a jobsite with an object of forcing a general contractor to compel his subcontractors to sign union contracts was secondary boycott activity violative of the Act, because:

> "The fact that the contractor and subcontractor were engaged on the same construction project, and that the contractor had some supervision over the subcontractor's work, did not eliminate the status of each as an independent contractor or make the employees of one the employees of the other." 341 U.S. at 689-690.

The legal result was that a general contractor who kept all of the prime contract work for himself could be picketed regarding all such work, whereas a general contractor who divided part of the prime contract among subcontractors was insulated from picketing regarding such subcontracted work.[3] Thus, the general contractor who divided the prime contract could be picketed by a union representing employees whom he employed only under the following circumstances: (1) where the contractor and union were engaged in normal

[2] Section 8(e), 29 U.S.C. § 158(e), provides:

> "It shall be an unfair labor practice for any labor organization and any employer to enter into any contract or agreement, express or implied, whereby such employer ceases or refrains or agrees to cease or refrain from handling, using, selling, transporting or otherwise dealing in any of the products of any other employer, or to cease doing business with any other person, and any contract or agreement entered into heretofore or hereafter containing such an agreement shall be to such extent unenforceable and void: *Provided*, That nothing in this subsection (e) shall apply to an agreement between a labor organization and an employer in the construction industry relating to the contracting or subcontracting of work to be done at the site of the construction, alteration, painting, or repair of a building, structure, or other work: *Provided further*, That for the purposes of this subsection (e) and section 8(b)(4)(B) the terms 'any employer', 'any person engaged in commerce or in industry affecting commerce', and 'any person' when used in relation to the terms 'any other producer, processor, or manufacturer', 'any other employer', or 'any other person' shall not include persons in the relation of a jobber, manufacturer, contractor, or subcontractor working on the goods or premises of the jobber or manufacturer or performing parts of an integrated process of production in the apparel and clothing industry: *Provided further*, That nothing in this Act shall prohibit the enforcement of any agreement which is within the foregoing exception."

[3] Even the dissent, that contended the jobsite should be considered a single entity, conceded a union could not picket a site remote from the dispute. This, they stated: "The union was not pursuing the contractor to other jobs. All the union asked was that the union men not be compelled to work alongside nonunion men on the same job." *Id.* at 692.

collective bargaining, and (2) where the contractor and union had no contract and the union was engaged in lawful recognitional picketing.

A 1958 Supreme Court decision on a different issue — *Local 1976, U.B.C. and J. (Sand Door) v. N.L.R.B.*, 357 U.S. 93 (1958) — also figured prominently in the 1959 Congressional debates. The Supreme Court ruled in *Sand Door* that picketing to enforce a hot cargo agreement was unlawful, but that in all industries a union and an employer could voluntarily agree to such an agreement boycotting all companies which were nonunion. 357 U.S. at 98-99.

B. The Legislative History

These two decisions caused widespread sentiment for two quite separate — but ultimately interrelated — changes in the law: first, to outlaw hot cargo agreements in all industries as well as coercive action to obtain and enforce them, and, second, to recognize the unique characteristics of the construction industry by reversing the *Denver Building Trades* decision. Thus, proponents in both the Senate and House introduced sweeping prohibitions against hot cargo agreements.[4] Bills were also submitted in the Senate and House providing for construction industry exemptions from the secondary boycott prohibitions of the Act, including of course any prohibitions on agreements to boycott.[5] These bills reflected a disagreement with the Supreme Court's *Denver Building Trades* conclusion that contractors and subcontractors who were performing various portions of the prime construction contract were nevertheless separate entities for purposes of secondary boycotts.

The bills designed to overrule *Denver Building Trades* were not acceptable in either body. Both the Senate and House bills, as passed and submited to the Senate-House conference, contained no special rules for the construction in-

[4] S. 1385, in I Legislative History of the Labor Management Reporting and Disclosure Act of 1959, at 330 (hereinafter cited as Leg. Hist.), and H.R. 8400, in I Leg. Hist. 619.

[5] S. 748, in I Leg. Hist. 84, and H.R. 8342, in I Leg. Hist. 687.

dustry. The Senate bill contained a hot cargo clause limited to the trucking industry;[6] the House bill banned hot cargo clauses in all industries.[7]

When the Senate and House bills were considered by the conference committee, there was a serious clash as to whether the secondary boycott provisions of the House bill or the limited provisions of the Senate bill should be approved.[8] The result of this clash was a compromise bill which was overwhelmingly approved by both legislative bodies. In this final compromise, the proponents for exempting the construction industry failed to obtain their goal of overruling *Denver Building Trades*. They were able to obtain only the limited exemption of the proviso. The explanations offered by the conferees of their compromise bill make it crystal clear that the proviso left *Denver Building Trades* good law. The conference report explained that:

> "The committee of conference does not intend that this proviso should be construed so as to change the present state of the law with respect to the validity of this specific type of agreement relating to work to be done at the site of the construction project or to remove the limitations which the present law imposes with respect to such agreements. Picketing to enforce such contract would be illegal under the *Sand Door* case

[6] S. 1555, in I Leg. Hist. 338.

[7] H.R. 8400, *supra*. The Elliott bill, H.R. 8342, *supra*, was actually reported to the House floor by the House Committee on Labor and Education. But even the limited construction industry exemption of that bill proved too much for the House as a whole. The Elliott bill was rejected in favor of the Landrum-Griffin bill, H.R. 8400 and 8401, which contained a total ban on hot cargo agreements and no construction industry exemption whatsoever. 105 Cong. Rec. 14519-14520, in II Leg. Hist. 1691-1692.

[8] Indeed, Senator Prouty suggested an amendment which would have exempted the construction industry from all of the Landrum-Griffin bill's secondary boycott provisions. 105 Con. Rec. 16256, in II Leg. Hist. 1390. Senator Prouty's amendment was very similar to the exemption found in S. 748. Senator Prouty's suggestion was rejected as it involved a substantive alteration of the bill as passed and was inappropriate for consideration by the committee. 105 Cong. Rec. 12263-12264, in II Leg. Hist. 1397-1398.

> * * * * To the extent that such agreements are legal today * * * the proviso would prevent such legality from being affected by section 8(e). The proviso applies only to section 8(e) and therefore leaves unaffected the law developed under section 8(b)(4). *The Denver Building Trades* and the *Moore Drydock*[9] cases would remain in full force and effect. The proviso was not intended to limit change or modify the present state of the law with respect to picketing at the site of a construction project. Restrictions and limitaions imposed upon such picketing under present law as interpreted, for example, in the Supreme Court decision in the *Denver Building Trades* case would remain in full force and effect." H.R. No. 1147 on S. 1555, in I Leg. Hist. 934-943.

On September 3, 1959, the Senate considered the report of the conference committee preparatory to passing the amendments. Then Senator Kennedy, in discussing the subject of hot cargo clauses and the construction industry proviso, stated:

> 'The first proviso under the new section 8(e) of the National Labor Relations Act is intended to preserve the present state of the law with respect to picketing at the site of a consruction project and with respect to the validity of agreement relating to the contracting of work to be done at the site of a construction project.
>
> "This proviso affects only section 8(e) and therefore leaves unaffected the law developed under section 8(b)(4). The *Denver Building Trades* (341 U.S. 675) and the *Moore Drydock* (92 NLRB 547) cases would remain in force." 105 Cong. Rec. 16415, in II Leg. Hist. 1433.

And Representative Barden reported to the House:

> "[The first proviso under subsection (e)] is intended to permit what is now lawful * * * *" 105 Cong. Rec. 16630, in II Leg. Hist. 1715.

[9] *Sailor's Union of the Pacific and Moore Dry Dock*, 92 N.L.R.B. 547 (1950), delineating those circumstances wherein a union can legitimately picket the premises of a secondary employer.

Congress was asked to allow building trade unions the right to picket contractors to affect the nonunion character of their subcontractors. Congress rejected this plan, granting a partial concession for the traditional jobsite situation. The General Counsel's position flies in the face of this legislative history and now grants the building trade unions what Congress refused to permit and what the Supreme Court disallowed in *Denver Building Trades*, namely, the right to picket a general contractor with whom they have no dispute or bargaining relationship solely because of his subcontracting polices.[10]

The General Counsel has also destroyed the distinction between the construction industry proviso and garment industry proviso. The legislative history demonstrates conclusively that the garment industry was afforded a complete exception to the proscriptions of section (e) and section 8(b)(4). Thus, the conference report provides:

> "The second proviso specifies that for the purpose of this subsection (e) and section 8(b)(4) the terms 'any employer', 'any person engaged in commerce or in industry affecting commerce', and 'any person' when used in relation to the terms 'any other producer, processor, or manufacturer', 'any other employer', or 'any other person' shall not include persons in the relation of a jobber, manufacturer, contractor, or subcontractor working on the goods or premises of a jobber or manufacturer or performing parts of an integrated process of production in the apparel and clothing industry. This proviso grants a limited exemption in three specific situations in the apparel and clothing industry, but in no other industry regardless of whether similar integrated process of production may exist between jobbers, manufacturers, contractors, and subcontractors." H.R. No. 1147 on S. 1555, in I Leg. Hist. 944.

[10] The union, in order to fall within the General Counsel's *Ponsford* exception, would have to establish that its sole motive was contractor acceptance of a hot cargo agreement.

Senator Goldwater, when asked to explain this proviso, responded as follows:

> "Question. Are 'hot cargo' agreements illegal under the new legislation?
>
> "Answer. For all purposes . . . But, there are two exceptions. The garment industry is exempted. • • •
>
> "Question. Isn't there an exception to the construction industry, too?
>
> "Answer. *The exception to the construction industry is only a partial one. They don't get what the garment industry gets. They are left in status quo.* • • •
>
> "So that the building construction industry is left to the law as it is now; the garment industry gets complete exemption from the prohibition and all other industries get a complete prohibition." (Emphasis supplied) 105 Cong. Rec. A8358-8359, in II Leg. Hist. 1829-1830.[11]

The General Counsel's position in *Ponsford* essentially abolishes this difference, that is, construction contractors like manufacturers in the garment industry would be the valid subject of economic coercion for the purpose of obtaining an agreement not to subcontract to nonunion employers generally, without the necessity that there be a nexus between the contractor and the underlying dispute. Once again, what Congress rejected in 1959, the General Counsel approves in *Ponsford*.

C. The General Counsel's Action is an Abuse of Administrative Power

Particularly distressing is the General Counsel's failure to afford the Board an opportunity to consider the issue in *Ponsford* after it had been fully litigated by the parties.

[11] See also, 105 Cong. Rec. 16209 (Remarks of Senator Javits), in II Leg. Hist. 1387; 105 Cong. Rec. 1734 (Remarks of Representative Libonati), in II Leg. Hist. 1734; 105 Cong. Rec. 16651-16652 (Remarks of Representative Halpern), in II Leg. Hist. 1736-1737.

This totally contradicts the General Counsel's stated policy of authorizing complaints in cases involving substantial and novel issues to obtain clarification of the law by decisions by the five-member Board and is repugnant to sound principles of administrative law.[12] Contrary to his protestations that the issue in *Ponsford* has been considered, the cases cited by the General Counsel did not involve picketing of a general contractor by a union with which the contractor had no nexus to support a hot cargo agreement, and where the question of the validity of such picketing was considered by the Board. What the General Counsel did was search for obscure facts in decided cases to justify his position, cases which clearly never addressed the crucial issue in *Ponsford*.

D. The Practical Effect of the General Counsel's Decision

Under present law a nonunion general contractor in the construction industry is protected by 8(b)(7) if picketed. Arguably, under the ruling of the General Counsel, if the union can tenably argue that theirs is not recognitional picketing but picketing to gain an 8(e) agreement, the protection of 8(b)(7) would disappear and the union could picket forever. A Union general contractor has the protection of his contract which will contain either an 8(e) agreement or a no-strike clause. In either case he is insulated from picketing unless the General Counsel's position is sustainable. Using the *Ponsford* rationale, this union general contractor could be picketed by any construction union, other than that with whom it has contracted, which sought to organize unrelated potential subcontractors. It is an understatement to say that this would result in an enormous increase of picketing in the industry.

Moreover, now, under the reserved gate doctrine and *Moore Dry Dock*, a general contractor can insulate himself

[12] See, e.g., the General Counsel's case-handling guideline memorandum to be used in handling unfair labor practice cases arising under the new nonprofit hospital amendments to the National Labor Relations Act (Public Law 93-360), issued August 25, 1974.

from the disputes of his subcontractors. The General Counsel has arguably created a loophole to this sound decision in contradiction to the legislative history of the Act which stated that *Moore Dry Dock* was to remain good law. If the union could convince the Board that its object was to obtain an 8(e) clause in a general contractor's contract, rather than to drive a nonunion subcontractor off a project, the *Moore Dry Dock* protection afforded that general contractor would evaporate and the subcontractor's union could picket at reserved gates used only by the general contractor and other neutrals.

These examples of activity, arguably legitimatized by the General Counsel's decision, demonstrate the extent to which that decision contravenes the legislative intent that the proviso, as a compromise, would not affect in any way the right to picket at construction jobsites. This enormous shift in bargaining power is unjustified, especially when effected by administrative fiat.

E. Summary

The General Counsel has arguably created a device whereby every building trade union could picket any contractor in the industry without regard to their relationship. Such action by the General Counsel is totally unwarranted, especially where, as here, it constitutes the determination of one individual establishing important changes in the law and effecting sweeping shifts in the delicate balance of bargaining with respect to labor-management relations. It is particularly disturbing where a most efficient, expert and relatively inexpensive procedure is readily available for the resolution of these issues. The General Counsel has overruled *Denver Building Trades*, turned his back on the legislative history of the construction industry proviso of the Act and, by administrative fiat, closed the doors on parties whose substantial rights were materially affected thereby. We believe this is a clear case of administrative abuse of power.

Supreme Court, U. S.
FILED
27 1974
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM—1973

No. 731256

CONNELL CONSTRUCTION COMPANY, INC.,
Petitioner,

v.

PLUMBERS AND STEAMFITTERS LOCAL UNION NO. 100, etc.,
Respondent.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT ON BEHALF OF ASSOCIATED GENERAL CONTRACTORS OF AMERICA, BUILDING CHAPTERS OF THE ASSOCIATED GENERAL CONTRACTORS OF TEXAS AND NATIONAL ASSOCIATION OF HOME BUILDERS AS *AMICI CURIAE*

VINCENT J. APRUZZESE
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IN THE

Supreme Court of the United States

OCTOBER TERM—1973

No. 731256

CONNELL CONSTRUCTION COMPANY, INC.,
Petitioner,

v.

PLUMBERS AND STEAMFITTERS LOCAL UNION NO. 100, etc.,
Respondent.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT ON BEHALF OF ASSOCIATED GENERAL CONTRACTORS OF AMERICA, BUILDING CHAPTERS OF THE ASSOCIATED GENERAL CONTRACTORS OF TEXAS AND NATIONAL ASSOCIATION OF HOME BUILDERS AS *AMICI CURIAE*

Introduction

This brief on behalf of Associated General Contractors of America, Associated General Contractors of Texas and the National Association of Home Builders, as *amici*

curiae, is filed pursuant to written consent of the parties under Rule 42(2) of this Court. It is in support of the petitioner, Connell Construction Co., Inc.

Interest of *Amici*

In the United States general construction costs, including maintenance and repair, total approximately $160,000,000,000.00 yearly. This amount represents approximately ⅛ of the nation's annual gross nations product. The general construction industry as a whole accounts, either directly or indirectly, for the livelihood of one out of every seven employees.

The Associated General Contractors of America (AGC herein) represents approximately 9,500 union and non-union general contractors. In addition, the AGC has some 75,000 union and non-union associate members who are non-general contractors in the mechanical, electrical and other specialized fields. The AGC has chapters in each of the fifty states. AGC members perform about 75% of the general construction contracts in the United States.

The Building Chapters of the Associated General Contractors of Texas are affiliated with the national AGC and the outcome of this litigation will have far-reaching impact on the way they are able to do business in the future.

The National Association of Home Builders is a national trade association of over 51,000 members affiliated with 481 local and state associations in each of the fifty states, Puerto Rico and the Virgin Islands. Its membership annually performs the largest share of new residential construction throughout the United States.

Summary of Reasons for Granting the Writ

The Circuit Court below erroneously concluded that a conspiracy did not exist and refused to consider the labor law question involved, the resolution of which would have aided it in its determination of whether or not the union had a legitimate union interest under antitrust law. Thus, it left unanswered the question of whether unlawful secondary boycott activity under labor law may simultaneously be considered lawful activity in furtherance of a legitimate union interest under antitrust law. In declining to consider the labor law issue involved, the Court abdicated its jurisdiction and clear responsibility thereby giving its imprimatur to conduct that violates not only secondary boycott proscriptions of the National Labor Relations Act, but also undermines extremely important basic rights guaranteed to employees, employers and the public alike under our federal labor policy.

The factual setting here involved presents an issue of critical importance to the construction industry, and concerns the use of economic coercion in obtaining "hot cargo" provisions. This is the first opportunity that this Court has had to review such issue since the 1959 amendments to the Act. The decision below departs from the teachings of this Court in many respects under antitrust and labor law precedents of long standing. Concerning as it does, the largest industry in the nation, such far-reaching issues of enormous impact on our economy urgently require consideration.

REASONS FOR GRANTING THE WRIT

I. The Issues and Effects of the Decision of the Court of Appeals.

The issues presented by this case are of enormous importance to the many thousands of employers and millions of employees engaged in the construction industry, to builders, owners and the public.

The Court of Appeals recognized the broad national significance of the issues presented by this case. Thus, the Court said, "It becomes readily apparent that while this case is framed in the terms of anti-trust, its origins and implications are most intimately connected with and extremely important to the delicate balance of labor-management power in the construction industry and national labor policy pertaining thereto." *Connell Const. Co. Inc.* v. *Plumbers & Steamfitters Local U. No. 100,* 483 F. 2d 1154, 1157 (5 Cir. 1973).

The final decision herein will determine:

(1) Whether a union may through economic coercion compel neutral employers in the construction industry with whom it neither has nor desires a collective bargaining relationship to agree to boycott and refrain from contracting with any employer-subcontractor with whom the union does not have a collective bargaining contract.

(2) Whether such a broad and unlimited employer boycott may be imposed by a union in the absence of any basis for a bargaining relationship.

(3) Whether owners, contractors, suppliers, manufacturers and other employers who perform some degree of construction work on and off site may continue to contract to do business with each other on a competitive basis.

(4) Whether the economic coercion exerted by a union to obtain an agreement of the kind in issue herein, and the agreement itself, is lawful under the construction industry proviso to Section 8(e) of the National Labor Relations Act (herein NLRA).[1] If not lawful under the proviso to Section 8(e), can it be a legitimate union interest under the anti-trust laws?

(5) Whether vast new exceptions have been carved out of our federal anti-trust laws.

(6) Whether state anti-trust laws are pre-empted by federal labor laws.

(7) Whether federal courts have jurisdiction to render decisions in anti-trust cases where such decisions require the interpretation or application of federal labor statutes, or whether the doctrine of primary jurisdiction requires such questions to be decided initially by the National Labor Relations Board.

(8) Whether the millions of employees who derive their livelihood from construction work have the same basic freedoms and rights under the NLRA[2] as other employees generally, or whether Congress through enactment of the construction industry proviso to Section 8(e)[3] effectively stripped from them protections guaranteed to other employees.

The majority of the Court of Appeals has found, in effect, that unions may picket neutral contractors to com-

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[1] 61 Stat. 136; 73 Stat. 519, 29 USC 151 *et seq.*

[2] Section 7, 29 USC 157.

[3] 29 U.S.C. 158(e).

pel them to agree not to contract with other employers who do not have a collective bargaining agreement with the union. The majority opinion concluded that the Respondent Union was pursuing a legitimate union interest because the agreement in issue touched on matters of concern to the working man. Their concept of a "legitimate union interest" which they state may be broader than conduct protected by the NLRA, does not consider whether the conduct is specifically prohibited by the NLRA and thus, quite illegitimate under labor law. Moreover, the majority evades this issue by its misplaced reliance on the doctrine of primary jurisdiction of the National Labor Relations Board (N.L.R.B., Board herein) in such matters.

In this regard the majority opinion specifically stated it felt quite strongly that the Board should consider the matter at the earliest available opportunity. The majority, having knowledge that the Board's General Counsel had refused in the past to issue a complaint in this type of case, also admonished that a continued refusal to decide the difficult issues involved could amount to an administrative abuse of discretion.[4] Those words, however, have fallen on deaf ears, and the Board's General Counsel continues to fail or refuse to issue complaints in cases involving the identical or substantially identical subcontractor agreement which were pending at the time of the decision of the Court of Appeals and are still pending as this petition is filed.[5]

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[4] 483 F. 2d at 1174-1175.

[5] *Ponsford Bros.*, N.L.R.B. Case Nos. 28-CC-417 and 28-CE-12; and *Hagler Construction Co.*, N.L.R.B. Case No. 10-CC-447; *Howard U. Freeman, Inc.*, 16-CC-472, 16-CC-477. Since then other cases have been filed involving such restrictive agreements, and the NLRB General Counsel has similarly failed to act upon them.

The majority also ruled that Connell could not pursue a remedy under the Texas anti-trust laws because those state laws had been pre-empted by the federal labor laws.

II. The Anti-Trust Considerations.

This Court in *Allen Bradley Co.* v. *Local 3 IBEW*, 325 U. S. 797 (1945), found that a boycott of electrical products in New York City violated the Sherman Act. Here, the Court is confronted with much more than a product boycott because the agreement *sub judice* includes a product boycott in its all pervasive employer boycott. This is true because of the manner in which construction contracts are let in the construction industry. Historically, labor in the construction industry has not been covered by a separate contract; rather it has been included as a part of the entire contract. The cost of the mechanical contract is generally a very substantial percentage of the total cost of the entire project, and depending upon the type of project, frequently amounts to between 40% and 60% of total construction costs. On larger projects, such as power plants and refineries, the cost of the mechanical equipment, products and supplies covered by the mechanical contract can run into many millions of dollars.

Accordingly, subcontractors, or specialty contractors as they are frequently referred to, sell both product and labor by subcontract to a general contractor who has responsibility for the entire job. Thus, if a given subcontractor employer is excluded because he is not part of the preferred class, both his product (prefabricated or otherwise) as well as his labor is excluded. It locks in the preferred class and locks out everyone else, thereby granting the union building trades and the employers under

contract to them a monopolistic stranglehold on the market.[6] Unless struck down by this Court, the type of employer boycott produced undoubtedly will sweep through the construction industry like wild fire, consuming those employers and their employees who dare resist.

From the standpoint of the employer not in the preferred class, if the union refuses, for any reason, to enter into a collective bargaining agreement with him, he and his employees are foreclosed from the market place. There is no way that an employer or his employees can force a union to sign a collective bargaining agreement. The employer and his employees are at the mercy or whim of the union. The union is in the position of complete dominance and can dictate which employers may enter the market place.

Having this awesome power, the union is likewise in the position of dictating other terms and conditions of how the employer may conduct his business, either within or outside the framework of any collective bargaining agreement. Once the union is elevated to this position of power, even the desires of the employees in the preferred unit can be meaningless and rights under Section 7 of the NLRA completely destroyed.[7] A vote by the

[6] As Judge Clark said in his dissent, "Since no general contractor could withstand the pressure of having his entire work picketed, the meaning to everyone in the plumbing trade is clear—get in Plumbers Local 100 or get out of business." 483 F. 2d at 1176.

[7] 29 USC 157.

employees in such a unit to decertify the union is tantamount to electing unemployment.[8]

The Court of Appeals viewed the facts of this case as not violating the "conspiracy test" enunciated by this Court in such cases as *Allen Bradley, supra,* and *United Mine Workers* v. *Pennington,* 381 U. S. 657 (1965) or the "legitimate union interest" test explicated in *Local 189 Amalgamated Meat Cutters* v. *Jewel Tea Co.,* 381 U. S. 676 (1965). In both instances the majority of the Court fails to perceive the massive nature of this employer boycott bottomed on an agreement in restraint of trade.

A conspiracy was shown and does exist. Moreover, the refusal of the Court to decide the labor law issues compounded the problem and stems from its misplaced reliance on the doctrine of primary jurisdiction. It receded from such inquiry despite the fact that it is very critical of the failure of the General Counsel of the Board to issue a complaint in similar cases thereby preventing the Board from coming to grips with the issue.

The factual record clearly establishes that the Union had previously entered into a master agreement with the

[8] As Judge Clark concluded in his dissent:

> "Therefore, I would hold that where a union bypasses the congressionally sanctioned methods of organizing the employer whose employees it seeks to unite (here, the individual subcontractors) and illegally brings pressure on a neutral, secondary source of work for all such employers within an area (Connell) to force that unrelated economic entity to execute a contract which requires that all directly involved subcontractors bring their work forces into the membership of this local or starve for lack of work, then that union has passed beyond the scope of antitrust immunity." (footnote omitted) 483 F. 2d at 1179

area multi-employer bargaining unit of mechanical and plumbing contractors whereby the Union agreed that it would ". . . not grant or enter into any arrangement or understanding with any other employer which provides for any wages less than stipulated in this Agreement . . ."[9] The record shows that the Union would not permit any employer to sign a contract other than the Master Agreement.[10] That agreement surely does not comport with the standard pronounced in *Pennington, supra,* where this Court said,

> "We think it beyond question that a union may conclude a wage agreement for the multi-employer bargaining unit without violating the anti-trust laws and that it may as a matter of its own policy, and *not by agreement with all or part of the employers of that unit,* seek the same wages from other employers." 381 U.S. at 664 (Emphasis added).

Perforce, if the union goes beyond that limitation and specifically agrees in writing that no other employer will be given better rates, it is a clear anti-trust violation. That is precisely the case here.

By contrast and drawing from the teachings of *Pennington,* the Board considered the legality of such "most favored nations" clauses in *Dolly Madison Industries, Inc.,* 182 NLRB 1037 (1970). In that case the clause provided in essence that should the union at any time enter into an agreement with an employer in the same industry which provided for more favorable terms and conditions, the signatory employer would be privileged to adopt such advantageous terms and conditions as its own. Holding such a provision to be lawful and comparing it to *Pennington* the Board stated,

> ". . . [A]s pointed out by the Supreme Court, the union by reason of the clause there involved abandoned the right to which it and those of its members who were employed by other employers were entitled under the Act to bargain collectively with such other employers concerning substantial terms and conditions of employment—and this to the detriment of itself and other members, thereby frustrating the purposes of the Act." 182 NLRB at 1038.

Yet, the Court's majority decision would sanction conduct which permits the Union to extract an agreement from Connell which would broaden that conspiracy (between the Union and the multi-employer unit of plumbing contractors) by requiring Connell as an unwilling co-conspirator to *impose* the union contract upon its subcontractors or cease doing business with them. Moreover, the Court majority sanctions such conduct by way of economic coercion even though Connell does not have employees who are represented by the Union. In this case, therefore, apart from the illegal nature of the "most favored nations" clause sought, there is absent that critical factor without which such demand is improper, namely, the bargaining relationship.

Consequently, the evil so well enunciated by this Court in *Pennington, supra,* and the Board in *Dolly Madison, supra,* is apparent. Connell has now become an unwilling

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[9] Article XIX, Master Collective Bargaining Agreement (see Petitioner's brief page 9 fn. 6.)

[10] See petitioner's *Statement of the Case* (page 5) in which it refers to testimony by the Union's business agent that the only collective bargaining agreement the union could enter into with plumbing firms was the identical agreement the union had with the multi-employer group of mechanical contractors.

coerced conspirator with the Union and members of the employer group. The conspiracy, therefore, is a very real one which has the effect of preventing employers outside of the preferred class and their employees from doing business with Connell and from determining their own destiny under our federal labor law policy. Manifestly, the agreement would virtually eliminate real competition in the construction industry by removing as a competitive factor, a critical element of a contractor's costs. Indeed, the conspiracy here is more tightly constricted than in normal anti-trust cases. The contract imposed upon Connell would prevent Connell from doing business with an employer *even on the same terms as members of the association, if (a) his employees were either unrepresented or (b) were represented by another union and already covered by a contract.*

Connell must only deal with an employer under contract to the Union and on no more favorable terms. And so the conspiratorial circle is closed, as more and more employers, seeking to do business with Connell, if not members of the association, must execute a contract with the Union whether or not it is in their best interest or that of their employees—and *regardless of its legality.* For example, let us assume Employer A has already entered into a lawful agreement with Union B. How then may it sign a contract with Respondent Local 100 without committing an unfair labor practice? Let us assume further that the employees of Employer A have rejected Respondent Local 100 in a Board conducted election and have voted for no union. How may the employer lawfully recognize Local 100 as its employees' collective bargaining agent and thereby enable himself to do business with Connell? If Local 100, for whatever reason, refuses to permit an employer to sign the multi-employer association agreement, then that employer and his employees are foreclosed from doing business with Connell and all other employers who have similarly signed such restrictive agreement, and quite incongruously, even if an employer and his employees sincerely wanted a relationship by collective bargaining agreement with Local 100, Local 100 cannot engage in good faith collective bargaining because it is bound to offer said employer and his employees no better contract than that negotiated with the multi-employer group.

Clearly, this is an unfair labor practice and a refusal to bargain in good faith. Indeed, it makes the "take it or leave it" Bulwarism[11] approach to bargaining innocuous by comparison. At least Bulwarism was predicated upon a collective bargaining relationship in which the parties had previously negotiated *their own agreement* and the only issue was the bargaining stance of one of the parties.

What is the result if rival unions, possibly emerging unions dedicated to the representation of minorities and females, likewise exerted economic coercion to compel execution of similarly restrictive agreements? If a basis for collective bargaining is not needed, what is to prevent an employer from being successively picketed by rival unions for such agreements? Does the employer capitulate to the demands of each? What does an employer do in the case of a small job where no union subcontractor submits a bid? If the employer is forced to sign more than one such agreement, what are his legal defenses, if any, when sued for specific performance or damages? Where, in such event would employers like Connell and those with whom it would do business turn, if such conduct did not violate

[11] *N.L.R.B.* v. *General Electric Company*, 418 F. 2d 736 (2 Cir. 1969) cert. den. 397 US 965 (1970) reh. den. 397 US 1059 (1970).

the federal anti-trust laws, the state anti-trust laws and the Board could not, as here, consider the matter because its General Counsel refuses to issue complaints?

In a factual setting like *Denver Building Trades* the electrical union there need only change its picket sign to indicate that it is seeking the execution of a subcontractor agreement from the general contractor and that conduct would be lawful. Thus, the teachings of this Court in *N.L.R.B.* v. *Denver Building and Construction Trades Council*, 341 U.S. 675 (1951) and the long line of cases adhering thereto would become meaningless.

These examples point out the complete incompatibility of the majority's decision with the basic purposes of the National Labor Relations Act. While the construction industry enjoys a certain "favored" status under the Act, we emphasize again that the vital element absent here is that the agreement does not address itself to the labor relations of the "employer *vis-a-vis* his own employees". *National Woodwork Mfrs. Ass'n* v. *NLRB*, 386 US 612 (1967) reh. den. 387 US 926 (1967). Failing this, it is clear secondary boycott activity. Thus, the union's interest is *not legitimate* and cannot avoid anti-trust strictures prohibiting such a massive restraint of trade.

The Sherman Act is "a comprehensive charter of economic liberty", *Northern Pacific R. Co.* v. *United States*, 356 U.S. 1, 4 (1958); "The heart of our national economic policy long has been faith in the value of competition", *Standard Oil* v. *F.T.C.*, 340 U.S. 231, at 248 (1951); and Courts should not impute to Congress an intent to carve out "vast exceptions" to the Sherman Act unless the Congressional purpose is plain, *Schwegmann Bros.* v. *Calvert Distillers Corporation*, 341 U.S. 384, at 395 (1950).

III. The Labor Law Aspects.

Having failed to find a conspiracy, the Court majority turned its attention to whether the Union had a legitimate interest in bringing pressure upon Connell to enter into the agreement in issue. However, to fully resolve that question, as the Court found, it is necessary to inquire into the meaning of Sections 8(b)(4)(B) and 8(e)[12] of the NLRA as amended. Regrettably, concluding that the initial decisions in such matters are within the exclusive domain of the Board, the Court discussed but failed to pass upon those questions. Having done so, it abandoned that which *was* its legitimate concern, namely to apply the *Jewel Tea* test to the union's conduct. Only through such an inquiry and determination can light be shed upon whether the union is pursuing a legitimate interest. Such an issue cannot be ignored. Indeed, there can be no finding that the restrictive agreement does not violate the federal anti-trust laws without first finding that the forcing of such employer boycotts is a legitimate union objective, that is, conduct protected by the National Labor Relations Act, or *at least* not unlawful under its provisions.[13]

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[12] 29 U.S.C. 158(b)(4)(B); 29 U.S.C. 158(e).

[13] As Judge Clark commented in his dissent:

> "Not all union misconduct constituting an unfair labor practice should entail a loss of union antitrust exemption; only the conduct which violates the congressionally-protected commercial rights of neutral parties would normally fall without the exemption. It is neither necessary nor appropriate for this dissent to attempt a complete catalogue of that labor law illegal conduct which falls without the exemption. Suffice it to say that since Section 8(e) is designed and intended to protect neutral parties from concerted boycotts required by union activity, a violation of that provision under circumstances similar to those here will place a union beyond the scope of the exemption."

A full understanding of Section 8(e) requires reconsideration of the principles explicated by Justice Frankfurter in this Court's so-called *Sand Door* decision. *Local 1976, etc.* v. *National Labor Rel. Board,* 357 U.S. 93 (1958). In that case, Justice Frankfurter speaking for the Court held that a union is free to approach an employer to persuade him *voluntarily* to sign a "hot cargo" clause, and thus to engage in a boycott so long as the union refrains from coercion. Thus, while recognizing that prior to the enactment of Section 8(e), in 1959, a labor organization and an employer could voluntarily enter into a "hot cargo" agreement, this Court nevertheless held that such a contract could not be enforced by coercive means specifically prohibited in Section 8(b)(4)(B) (formerly A) of the NLRA.[14]

It was also clear and undisputed law prior to the 1959 amendment adding Section 8(e) that a union *could not strike to obtain such a clause* without violating the secondary boycott provisions of the Act. *Texas Industries Inc., et al.,* 112 NLRB 923 enf. 234 F.2d 296 (5th Cir. 1956); *Bangor Bldg. Trades Council,* 123 NLRB 484, enf.

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[14] Interestingly, the dissent of Justice Douglas in *Sand Door,* which was joined by Chief Justice Warren and Justice Black and which would have permitted enforcement of such a provision by coercion, was based upon the reasoning that as the clause would be the product of *collective bargaining,* it should be enforceable just as any other provision of a collective bargaining agreement. Said Justice Douglas:

> "That provision was bargained for like every other clause in the collective agreement. It was agreed to by the employer. How important it may have been to the parties—how high or low in their scale of values—we do not know. But on these records *it was the product of bargaining, not of coercion.*" (357 U.S. at 112). (Emphasis added)

278 F.2d 287 (1st Cir. 1960); *Bricklayers, Masons and Plasterers, Int. U. of America* (*Selby-Battersby & Co.*), 125 NLRB 1179.

Initially, the congressional purpose of the 1959 amendments was to outlaw all "hot cargo" agreements even if voluntary in nature in all industries. Thus, the legislative history demonstrates the effort to make even such voluntary agreements as were considered legal under *Sand Door,* illegal. As debate continued, however, the construction industry proviso was added at the urging of the building trades unions, but as agreed upon, was merely intended to preserve to labor organizations in the construction field the rights which they possessed under *Sand Door* and before enactment of Section 8(e), namely, the right to secure such clauses *voluntarily.*

Then Senator Kennedy said,

> "Since the [8(e)] proviso does not relate to Section 8(b)(4), strikes and picketing to enforce the contracts excepted by the proviso will continue to be illegal under Section 8(b)(4) whenever the *Sand Door* case [35 LC P71, 599] (357 U.S. 93) is applicable. It is not intended to change the law with respect to the judicial enforcement of these contracts, or with respect to the *legality of a strike to obtain such a contract.*" II Legislative History of the Labor Management Reporting & Disclosure Act of 1959, 1433 (emphasis added)

Additionally, Representative Barden, Chairman of the House Labor Committee and a member of the Conference Committee, who presented the Conference Report to the House, stated that the first proviso to Section 8(e) would permit the making of *voluntary* agreements relating to contracting and subcontracting of work to be done at a con-

struction site. II Legislative History of the Labor Management Reporting and Disclosure Act of 1959, 1715.

Also, specifically preserved were the principles enunciated by this Court in *National Labor Rel. Bd.* v. *Denver Building and Construction Tr. C., supra,* condemning secondary boycotts intended to enmesh neutral contractors in disputes not their own.

Since Congress only intended to preserve the *status quo,* construction unions, therefore, came away with no greater rights than they enjoyed prior to the enactment of the proviso to Section 8(e). Yet, the decision below would permit a coercive boycott of secondary employers of unlimited reach, and at the same time thereby sanction a jurisdictional dispute of grand design. It confers an extraordinary, exclusive and preferred status upon construction unions without legal justification by valid precedent or legislative intendment.

Amici know of no cases where any court or Board decision has held that an employer can be forced by a picketing unit or union organization to enter into a "hot cargo" clause in the total absence of a collective bargaining relationship. Moreover, there never has been any expression by this Court since *Sand Door* in a construction industry case, approving the use of any form of coercion to obtain a "hot cargo" provision in a collective bargaining agreement. While the issue in *Sand Door* involved a strike to enforce a "hot cargo" provision which was struck down, even the dissent by Justice Douglas observed, that the clause in *Sand Door* ". . . was the product of *bargaining, not of coercion*". 357 US at 112 (See fn. 14 supra) (Emphasis added). Thereafter, the legislative history of the 1959 amendments make it clear beyond doubt that this status of the law was to be retained. And finally, Justice Brennan writing for

the majority in *National Woodwork* buttresses this position by observing that ". . . provisos were added to Section 8(e) to preserve the *status quo* in the construction industry . . .". 386 US at 637. Consequently, the issue of whether coercive conduct may be utilized in seeking a "hot cargo" clause, is one of novel impression before this Court since the 1959 amendments.[15]

Much confusion has developed with regard to this specific issue and it is submitted that the teachings of *Sand Door* and subsequent events, which span sixteen years involving the largest industry in the nation, require examination by this Court. It is also noteworthy that the Court in *National Woodwork* said, "We likewise do not have before us in these cases, and express no view upon,

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[15] This issue of whether or not coercive conduct can be used to obtain a "hot cargo" clause was first considered by the Board after the 1959 amendments in 1962 in *Colson and Stevens Const. Co.,* 137 NLRB 1650 (1962). The case warrants close reading and is extremely significant because of the unanimous expression of the full five-member Board prohibiting any coercion to obtain a "hot cargo" clause in the construction industry. Thereafter, because of disapproval of this view in three circuits, the Board reversed its original well-reasoned and well-founded opinion. Consequently, such holdings stand in conflict with *Sand Door.* However, the specific reach and meaning of the proviso to Section 8(e) has not been addressed by this Court in any context since the 1959 amendments. Moreover, even in cases that followed the reversal of *Colson and Stevens* where economic coercion has been allowed to obtain a "hot cargo" clause, the factual settings involved a collective bargaining vis-a-vis relationship, which fact is significantly absent here. *Northeastern Indiana Bldg. & Const. Tr. C. (Centlivre Village Apartments),* 148 NLRB 854 (1964); (where however the Board specifically noted that it was not passing upon the legality of the clause in question) 148 N.L.R.B. at 856 *fn.* 11; *Essex County and Vicinity District Council of Carpenters, etc.* v. *NLRB,* 332 F. 2d 636 (3rd Cir. 1964).

the antitrust limitations, if any, upon union-employer work preservation or work extension agreements. See *United Mine Workers of America* v. *Pennington*, 381 U.S. 657, 662-665". 386 U.S. at 632 fn 19. Thus, the issues mentioned in that footnote in addition to those here advanced have not been considered in the context of an antitrust case.

In *National Woodwork, supra,* this Court in considering whether so-called work preservation clauses violated the secondary boycott provisions of the Act, said:

> ". . . The touchstone is whether the agreement or its maintenance is addressed to the labor relations of the contracting employer vis-a-vis his own employees." 386 U.S. at 645.

If a vis-a-vis relationship is necessary to shield economic coercion for work preservation purposes, surely the absence of such relationship is fatal to "hot cargo" pressures. Connell has no employees represented by this labor organization and the union specifically disavows recognition. The union's objectives must, therefore, be tactically directed elsewhere. In fact, the Court below found that

> ". . . The central reason that the union wants the agreement sought in this case is that it will be helpful in organizing other subcontractors." 483 F.2d at 1167.

Thus, the *"vis-a-vis"* relationship is totally absent and the primary purposes of the Act, namely, to promote free collective bargaining are defeated.

Finally, in *Columbia River Package Ass'n Inc.* v. *Hinton*, 315 U.S. 143 (1942) an anti-trust case having labor law overtones, this Court said:

> "We recognize that by the terms of the statute there may be a 'labor dispute' where the disputants do not stand in the approximate relation of employer and employee. But the statutory classification, however broad, of parties and circumstances to which a 'labor dispute' may relate does not expand the application of the Act to include controversies upon which the employer-employee relationship has no bearing." 315 U.S. at 146-147.

iV. The Circuit Court's Holding Runs Contrary to the Fabric of the National Labor Relations Act.

The conduct here involved, is at complete variance with the basic purpose of the National Labor Relations Act. One has only to look at the broad Congressional intent expressed in Section 7 and throughout the act.[16] Section 7 preserves to employees the right to self-organization, to form, join, or assist a labor organization, and to bargain collectively through a representative of their own choosing. The right to refrain from such activities is also protected. The broad underlying purposes of Section 7 and the representative procedures of the Board have been relaxed in only one specific instance, the enactment of Section 8(f) in 1959.[17] Under this provision an employer primarily engaged in the construction industry is permitted to enter into a so-called "pre-hire" agreement recognizing a union (by a full collective bargaining agreement complete with all the terms and conditions of employment) even though it has *no employees* or *few em-*

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[16] 29 U.S.C. 157.

[17] See Appendix hereto.

ployees and the majority status of the union has not been established. However, as we shall see, it was not the Congressional purpose of Section 8(f) to permit the imposition of a collective bargaining relationship by coercion or in the absence of an existing or potential *vis-a-vis* relationship.

Section 8(f), by its terms *requires* that the employees who are to be covered by any such pre-hire agreement *must be members of the particular union negotiating the agreement*. Thus, Section 8(f) requires that which is clearly missing here, a valid basis for a bargaining relationship between the employer and the union. Herein lies the fatal defect in the scheme here presented—no *vis-a-vis* relationship and no possibility of such relationship.

Moreover, by providing that a pre-hire agreement shall not constitute a bar to an election under the Act by which dissatisfied employees may exercise their Section 7 rights, even in these exceptional circumstances, Congress has preserved to union members the right to determine their own destiny.

Finally, it is clear that a pre-hire agreement must be a voluntary arrangement. As the Ninth Circuit said in *Construction, Production and Maintenance Laborers U. Local 1383* v. *N.L.R.B.*, 323 F.2d 422 (9th Cir. 1963):

> "Section 8(f) makes certain prehire collective bargaining agreements, otherwise unlawful under the Act permissible in the construction industry; but the legislative history contains statements specifically disclaiming an intention thereby to authorize strikes or picketing to coerce such prehire agreements." 323 F. 2d at 425.

Thus, on what possible basis can the picketing in this case lawfully bring about such a contract with Connell? Is it at all logical to assume that Congress in 1959 would have so carefully drafted Section 8(f), creating unusual new rights but protecting against abuse of these rights by prohibiting coercion to utilize them only to have those protections wiped away in Section 8(e)? And, without one word of legislative history to support such a contention? Obviously not!

Clearly, rights granted in Section 8(f) are extraordinary and unusual, but they must be based upon voluntary agreement free from coercion. Similarly, as stated in the legislative history referring to *Sand Door*, and buttressed by the observation of Justice Brennan in *National Woodwork*, the construction industry proviso to Section 8(e) merely preserved pre-1959 *Sand Door* rights permitting a voluntary "hot cargo" clause obtained without coercion. Additionally, a 1959 amendment to the secondary boycott provision closed the loophole created by the *International Rice Milling*[18] decision, eliminating the need for concerted action and prohibiting any such secondary conduct by an individual. Finally, new provisions regulating various types of picketing and representation proceedings were included in Section 8(b)(7). Once again, the emphasis being to eliminate what has been described as blackmail picketing and proscribing picketing in various situations.

In sum, the 1959 amendments establish a clear pattern of requiring voluntariness, particularly in dealing with the construction industry proviso to Section 8(e) and

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[18] *National Labor Rel. Bd.* v. *International Rice Milling Co.*, 341 US 665 (1951).

Section 8(f), and further proscribed picketing and the use of coercion. The instant case stands in clear contravention of that pattern and the teachings of this Court.

If the decision below is permitted to stand, the obvious effect will be to impose a collective bargaining agreement upon neutral employers and their employees without further recourse, if they want to do business with Connell or vice versa.

Finally, we call the Court's attention to the fact that permitting coercion to be brought upon a general contractor to secure such a clause would allow the union to obtain indirectly that which it has been unable to obtain through enactment of the so-called common situs legislation it has perennially proposed, i.e., the ability to strike or picket any contractor at the site because of a dispute with any other contractor.[19] Congress has consistently denied this legislation, since 1960, but if the decision below were permitted to stand, it would not be needed.

Therefore, this case does not comport with either *Sand Door* or *National Woodwork*. It is not consistent with the purposes of the proviso to Section 8(e) or Section 8(f). In short, it is a completely novel approach to collective bargaining. The preamble of the Taft-Hartley Act states that its purpose is to prevent industrial strife which interferes with the normal flow of commerce and with the full production of articles and commodities for commerce and to promote free collective bargaining. The Act governs how this is to be brought about, regulated

[19] See for example H. R. 9070, H. R. 9089, H. R. 9373, and S. 2643 (86th Congress, 1960); H. R. 10027 (89th Congress 1965); H. R. 100 (90th and 91st Congress, 1967, 1969); H. R. 7438 (92nd Congress); and H. R. 4726 (93rd Congress, 1973).

and controlled. Astonishingly, this approach to a collective bargaining relationship does not promote, but rather seeks to prohibit free collective bargaining. It seeks to escape all the procedures and all the strictures of the Act by the unfettered use of coercion. Blackmail picketing does not foster free collective bargaining; it is a means whereby it is destroyed. Patently, as *amici* have urged above, the Union's scheme and restrictive agreement clearly runs counter to the entire fabric of the Act. It promotes, rather than eliminates, industrial strife.

V. The Court of Appeals has Jurisdiction to Decide Whether the Union's Conduct is Lawful Under Section 8(e) as a Vital Factor in its Determination Whether the Clause Represents "a Legitimate Union Interest" Under the Anti-Trust Laws as Construed by This Court.

The Court majority specifically notes that the Board's General Counsel has refused to act upon charges which would bring this question before that administrative body. Still, despite the recognized inaction of the General Counsel, the Court majority would leave the labor questions which are inextricably intertwined with the anti-trust question unresolved because it does not ". . . have original jurisdiction to determine *unfair labor practices.*" 483 F. 2d at 1174 (Emphasis added)

We agree that the Court does not have authority to make unfair labor practice findings as such. However, the determination as to whether the restrictive agreement in question violates Section 8(e) does not require a finding that it is an unfair labor practice, but merely a finding that if Congress did not intend by that section

to make such agreements legitimate, the Union's interest is not legitimate under the anti-trust laws. Surely, an employer should not be required to abandon his anti-trust remedy merely because another remedy before the Board though not forthcoming, is possible.

In his dissenting opinion, Judge Clark stated:

> ". . . In light of the General Counsel's established reluctance to submit the issue in this case to the Labor Board for resolution, and in view of the serious antitrust questions involved which are surely not within the scope of the Board's expertise, I would hold that this court and the district court below are not preempted from resolving the labor law problems in this anti-trust action." 483 F. 2d at 1180.

Amici submit that Judge Clark's view is proper and totally harmonious with the purposes of the National Labor Relations Act and the antitrust laws.

The courts are frequently called upon to adjudicate labor disputes. In fulfilling their role pursuant to Section 10(j) and 10(l)[20] they must determine whether there is reasonable cause to believe that a violation of the Act has been committed. In suits under Sections 301 and 303[21] their role clearly goes further to a determination under which the employer may recover damages.

In a Section 303 damage action the district court must determine whether the union's action constitutes an unlawful secondary boycott—a prime issue in this case.

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[20] 29 U.S.C. 160(j), (l)

[21] 29 U.S.C. 185; 29 U.S.C. 187.

No prior decision by the Board must precede a determination by the district court. *International L. & W Union* v. *Juneau Spruce Corp.*, 342 U. S. 237 (1952). Why, then, must a different standard be applied by a court called upon to make an anti-trust ruling involving the same labor law issue? Moreover, this problem was resolved by *Jewel Tea* where, concluding that the anti-trust issues in that case did not call for application of the doctrine of primary jurisdiction, this Court stated:

> ". . . [T]he doctrine of primary jurisdiction is not a doctrine of futility; it does not require resort to an expensive and merely delaying administrative proceeding when the case must eventually be decided on a controlling legal issue wholly unrelated to determinations for the ascertainment of which the proceeding was sent to the agency." *Federal Maritime Board* v. *Isbrandtsen Co.*, 356 U. S. 481, 521 (Frankfurter, J., dissenting)." 381 U. S. at 686.

The seriousness of the continuing problem to courts and litigants is highlighted by the inability of the Third and Sixth Circuits to obtain from the Board answers to labor law questions intertwined with anti-trust questions. *Int. Ass'n. etc.* v. *United Contractors, etc.*, 483 F. 2d 384 (3rd Cir. 1973); *Carpenters, etc., Pa.* v. *United Contr. Ass'n of Ohio Inc.*, 484 F. 2d 119 (6 Cir. 1973). In these cases, the courts directed that questions be certified to the Board, and the Board has thus far declined to answer the questions as directed. The Board's General Counsel has filed briefs in both cases, taking the position that there is no Board procedure available for the answering of such certified questions, and advising, in effect, that the Board can only answer questions in cases that have been processed through its administrative procedures. Yet, in cases

involving the kind of restrictive agreements involved herein, the General Counsel continues to refuse to issue complaints, notwithstanding the admonishment of the Fifth Circuit that such refusal may constitute an abuse of discretion. The question then is just how does petitioner obtain an answer from the Board or the courts where such answer is critical to the antitrust determination?

We submit, therefore, that the antitrust remedy which Connell seeks should not be deferred or forever denied because of its inability to obtain a definitive ruling on the labor law questions involved. The Court of Appeals should have considered the validity of the restrictive agreement under the proviso to Section 8(e), not in the context of an unfair labor practice case, but rather as a necessary element of *this* antitrust case, and as an issue within its province in any event. Only through the granting of this petition may such questions be answered.

CONCLUSION

Vital questions concerning the proper interpretation of the anti-trust laws and the National Labor Relations Act are presented by this case which are of critical significance to the construction industry, our economy and national labor policy. Accordingly, the Court is respectfully urged to grant the petition.

Respectfully submitted,

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APPENDIX

Section 8(f) (29 USC 158(f)) provides:

> "(f) It shall not be an unfair labor practice under subsections (a) and (b) of this section for an employer engaged primarily in the building and construction industry to make an agreement covering employees engaged (or who, upon their employment, will be engaged) in the building and construction industry with a labor organization of which building and construction employees are members (not established, maintained, or assisted by any action defined in subsection (a) of this section as an unfair labor practice) because (1) the majority status of such labor organization has not been established under the provisions of section 159 of this title prior to the making of such agreement, or (2) such agreement requires as a condition of employment, membership in such labor organization after the seventh day following the beginning of such employment or the effective date of the agreement, whichever is later, or (3) such agreement requires the employer to notify such labor organization of opportunities for employment with such employer, or gives such labor organization an opportunity to refer qualified applicants for such employment, or (4) such agreement specifies minimum training or experience qualifications for employment or provides for priority in opportunities for employment based upon length of service with such employer, in the industry or in the particular geographical area: Provided, That nothing in this subsection shall set aside the final proviso to subsection (a)(3) of this section: Pro-

vided further, That any agreement which would be invalid, but for clause (1) of this subsection, shall not be a bar to a petition filed pursuant to section 159(c) or 159(e) of this title."